Supreme Court, U.S.
FILED
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92-1227

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992 TERM

GORDON E. POWELSON, an individual, and CHICAGO TITLE INSURANCE COMPANY OF OREGON, an Oregon corporation,
Petitioners,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,
Respondent.

and

Gordon E. Powelson, Personal Representative of the ESTATE OF CLYDENA M. GROSS,
Petitioner,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROY B. THOMPSON
(Counsel of Record)
ROY B. THOMPSON, P.C.
SUITE 855
621 SW MORRISON
PORTLAND, OR 97205
(503) 224-0831

QUESTIONS ON APPEAL

1. Whether the Ninth Circuit erred in failing to address the issue (raise by the appellants) of Powelson the individual having raised a quiet title/declaratory judgment claim prior to the tax sale of his property. Sub-issue: Whether the Ninth Circuit erred in failing to address the error made by the District Court in ruling that the exclusive remedy after the tax sale was a claim for refund and dismissing the quiet title/declaratory judgment action.

2. Whether the Ninth Circuit erred in failing to address the issues (raised by the appellants) of the defects in the Levy and the Notice of Intent to Levy prior to the defective delivery of the Notice of Sale. Sub-issue: the distinction between the Personal Representative of the Estate and the Individual distributee.

3. Whether the Ninth Circuit erred in failing to address the issue (raised by the appellants) of the gap in the chain of title created by the government having seized the interest of the Individual distributee, yet having sold the interest of the Estate which had transferred the property years prior to the sale.

4. Whether the Ninth Circuit erred in ruling that where a tax sale is defective the remedy is a remand for a determination of whether the claim is merely for refund or is more akin to conversion, even after the Ninth Circuit has said "the sale can not stand."

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INTRODUCTION

This petition for writ of certiorari is from the Order and Amended Opinion of the Ninth Circuit Court of Appeals in two consolidated cases. The first action was Gordon E. Powelson as PERSONAL REPRESENTATIVE OF THE ESTATE OF CLYDENA M. GROSS, Plaintiff and GORDON E. POWELSON, Individual v. UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE, D.Ct. Civil No. 87-952-FR, 9th Cir. Docket No. 89-35736. The second action was GORDON E. POWELSON, an individual, and CHICAGO TITLE INSURANCE COMPANY OF OREGON, an Oregon corporation, Plaintiffs, v. UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE, Defendant., D. Ct. Civil No. 89-512-FR, 9th Cir. Docket No. 90-35005.

At the heart of this case is the plaintiffs'-petitioners'

assertion that the procedures used by the Internal Revenue Service in collecting Estate Tax liability were improper and illegal entitling the plaintiffs to a refund of the tax collected and/or a return of the property to its owner.

OPINIONS BELOW

The Ninth Circuit opinion below is reported as Powelson v. United States by and through Secretary of Treasury, 963 F.2d 1156 (9th Cir. 1992) [advance sheets only - withdrawn from bound volume at the request of the Ninth Circuit]. The District Court opinion in Civil No. 87-952-FR is reported as Powelson v. U.S., 64 AFTR 89-5932 ¶148,983.

JURISDICTION

The last Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit affirming in part, reversing in part and remanding the District Court judgment is dated December 8, 1992. Appendix A. That Order and Amended Opinion did not change the disposition of the case contained in the prior Order and Amended

Opinion which was filed October 23, 1992. This petition for certiorari is timely pursuant to Supreme Court Rule 13.4. Petitioners have filed a petition with the Ninth Circuit for a rehearing en banc, which does not stay the time for this petition for certiorari. Jurisdiction of this Court over this matter is invoked pursuant to 28 USC §1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

1(a) Docket No. 89-35736, D.Ct. No. 87-952: Plaintiff, Gordon Powelson as the Personal Representative of the Estate of Clydena M. Gross, commenced this action as a declaratory judgment action on August 21, 1987, after the defendant issued a Notice of Levy and Notice of seizure of real property for failure of plaintiff to pay Estate taxes. Plaintiff alleged that the Notice of Levy was illegal for failure of the IRS to issue the statutorily required Notice of Intention to Levy. Later the IRS issued a Notice of Intention to Levy and a second Levy and proceeded to sell

the property. Plaintiff alleged a series of procedural defects in the notices and the sale. Prior to the sale the personal representative, joined by the distributee, were granted leave to file an Amended Complaint which included 28 USC §2410 (Quiet Title) in its jurisdictional allegations. After the sale, the District Court ruled that the only relief available was for the Estate, through the personal representative, to bring an action for refund.

1(b) Docket No. 90-35005, D.Ct. No. 89-512: Plaintiff Gordon Powelson, in his individual capacity as distributee, commenced this action as one for declaratory judgment and quiet title on May 16, 1989, after his property had been sold by the IRS to pay the estate taxes owed by the Estate of Clydena M. Gross. Upon motion, the complaint was amended to add Chicago Title Insurance Company of Oregon, the purchaser at the tax sale, as an additional plaintiff. Plaintiffs alleged a series of defects in the notices and sale and alleged that there was a cloud on the title of the

purchaser due to the irregularities.

2(a) Course of Proceedings and Disposition Below

Docket No. 89-35736, D.Ct. No. 87-952: Defendant first moved against the original complaint on the grounds of lack of subject matter jurisdiction. The District Court ruled that jurisdiction did exist for a declaratory judgment action when the complaint does not attack the amount of the tax assessed, but only alleges procedural defects in the collection process. Appendix K. Prior to the scheduled sale an Amended Complaint was allowed, Appendix J, which added the individual distributee of the property as an additional plaintiff and included 28 USC §2410 (Quiet Title) in its jurisdictional allegations. Appendix I. The property was sold by the IRS on April 21, 1988.

After the sale of the property the District Court ruled that declaratory judgment was no longer available to the plaintiffs and that the only remaining remedy was a claim for refund by the Estate. Pursuant to this ruling, the Estate filed

an administrative claim for refund with the Internal Revenue Service. Eventually the Estate and the distributee were granted leave to file a Third Amended Complaint. The government then moved to strike the Third Amended Complaint on the ground that it contained declaratory judgment and quiet title claims in the name of the distributee, which had been allowed by the District Court in the first Amended Complaint of April 1988. The District Court granted the motion to strike and allowed the plaintiffs to file a Fourth Amended Complaint (Appendix D) which contained only a claim for refund for the Estate, and became the operative pleading. Upon cross-motions for summary judgment, the District Court granted summary judgment to the government and against the plaintiff on all counts. Appendix B.

2(b) Docket No. 90-35005, D.Ct. No. 89-512: Because the District Court would not recognize the existence of the individual distributee as a co-plaintiff in the first case,

Gordon Powelson, in his individual capacity as distributee commenced this action alone. The complaint was similar to the one filed in the Estate's case, but with an additional claim that the sale was defective for not having been held in the county in which the property was levied upon and seized. After motion plaintiff Chicago Title was added. The District Court granted the government's motion to dismiss ruling: (1) both Powelson the individual distributee and Chicago Title were third parties and therefore there was no waiver of sovereign immunity; and (2) there was no jurisdiction over the quiet title portion of the complaint because once the property was sold the government no longer claimed a lien on it. The plaintiffs then moved for reconsideration and for leave to amend the pleadings to reflect that since the title that was given to the purchaser was defective, the government had never transferred title to the property it had seized, and so the government still had an interest in the property. On November 22, 1989, the District Court issued

an order denying plaintiffs' motion for reconsideration. Appendix M. The District Court further ruled that the merits of the taxpayer's claim that the collection of the estate taxes was illegal were "fully litigated and determined" in the Estate's case. Appendix V.

3. Facts

Clydena M. Gross died testate July 29, 1980. The Will included a bequest of a pizza restaurant in Portland, Multnomah County, Oregon to Gordon E. Powelson, the son of the decedent. Beginning with the date of death, Powelson the individual treated the property as his own, collecting rents and paying property taxes.

The provisions of the Will also named Gordon Powelson as the Personal Representative of the Estate. The Will was probated in the Circuit Court of the State of Oregon for the County of Washington.

On or about June 30, 1981, an estate tax return was filed by the Estate showing estate taxes due in the amount of

$120,521.00. On August 17, 1981, the defendant assessed federal estate taxes and interest against the Estate in the sum of $147,492.24.

On January 20, 1982, the Washington County Probate Court order that the real property be distributed **from** the Estate to Gordon Powelson **the individual** nunc pro tunc July 29, 1980. Pursuant to the order, a Personal Representative's Deed was issued from the Estate to Gordon Powelson, and duly recorded.

On July 1, 1987, the government served Powelson the individual as distributee of the real property with a Statement of Levy and a Notice of Seizure, both based upon the failure of the Estate to pay the estate tax. Soon thereafter, the Estate's original complaint was filed asking for a declaration that because the government failed to issue a 10-day Notice of Intention to Levy as required by 26 USC §6331, the Levy and Seizure were void for failure to follow the required procedures. The Estate challenged only the procedural

validity of the tax levy and not the merits of the alleged tax liability. The government responded by challenging the jurisdiction of the District Court to hear any matter relating to internal revenue whatsoever. The District Court properly ruled that since the challenge was only to the procedures and not to the amount of the tax assessed, jurisdiction would lie under the statutory exception of 26 USC §6213(a) to the Anti-Injunction Act at 26 USC §7421, and therefore the action was allowed under the Declaratory Judgment Act, 28 USC §2201(a).

On February 5, 1988, the government sent to the Estate a Notice of Intention to Levy. On February 16, 1988, the government issued second Notices of Levy and Seizure to Powelson the individual as distributee of the property. On February 29, 1988, the government issued to the distributee of the property a release of the July 1, 1987 levy. On March 9, 1988, a Seizure and Sale worksheet was issued to the Estate.

On March 23, 1988, two IRS officers went to Powelson's residence to personally deliver a Notice of Sealed Bid Sale. The Notice offered for sale the interest of the individual distributee. Powelson was not home on this one attempt at personal delivery of the Notice, so the IRS sent copies of the Notice of Sealed Bid Sale by regular and certified mail.

Prior to the sale, an Amended Complaint was allowed which added the individual distributee as an additional plaintiff and asserted quiet title in its jurisdictional allegations.

On April 21, 1988, the property was sold by the IRS for $400,000.00 at its collection offices in Oregon City, Clackamas County, Oregon, even though the property was located in Multnomah County, Oregon. The deed given by the IRS after the sale purported to transfer the right, title and interest of the Estate of Clydena M. Gross, even though the property had been seized from the individual distributee.

After the sale the District Court ruled that the only action left was for the Estate to pursue a refund. Because the property belonged to the individual distributee, the plaintiffs attempted to amend the pleadings to claim a refund for the Estate and for declaratory judgment and quiet title for the individual. This was rebuffed by the District Court, leading to the Fourth Amended Complaint as the operative pleading in the first case.

On or about April 20, 1989, the IRS sent a check to the attorney for the Estate in the amount of $93,186.48 as "excess proceeds" from the sale. Pursuant to the instructions from the District Court, Appendix C, the funds have been deposited into escrow pending the final outcome of this case.

REASONS FOR GRANTING THE WRIT

> That no individual or public officer can sell, and convey good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which

> has been repeatedly recognized in this court. Thatcher v. Powell, 19 U.S. (6 Wheat.) 119, 125 (1821), Marshall, C.J.
>
> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. U.S. v. Heffner, 420 F2d 809 (4th Cir. 1969).

A. The Ninth Circuit erred in failing to address the issue (raise by the appellants) of Powelson the individual having raised a quiet title/declaratory judgment claim prior to the tax sale of his property. This issue was raised on appeal, but not addressed by the Ninth Circuit.

After the sale, the District Court ruled that the only remedy available to anyone was an action for refund by the Estate. That order allowing amendment only insofar as the Estate's claim for refund was entered on January 19, 1989. The District Court denied that the individual distributee whose property had been seized any longer had an available action for a declaration that the seizure and sale were illegal, even though the District Court had earlier allowed the first

Amended Complaint. The District Court's analysis was that since it was the Estate which was the primary taxpayer, the Estate was the only entity with a claim against the IRS. That analysis ignores the fact that it was the distributee who was most injured by the illegal and improper sale of the property, and that the individual distributee is liable for payment of the tax. 26 USC § 6901(h) and 7701(a)(14).

It was still within the District Court's jurisdiction to make a declaration as to the procedures used. The prohibition within the Declaratory Judgment Act against declarations "with respect to federal taxes" does not apply to procedural challenges. Rodriguez v. U.S. 629 F Supp 333, 341 (ND Ill, 1986). 28 USC §1340 does vest the District Court with jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. Little River Farms, Inc. v. U.S. Dep't. of Treasury, 328 F Supp 476, 478 (ND Ga, 1971). It is true that if this were an action challenging the amount or validity of the underlying

assessment the actio would be barred. But, when an action challenges only the procedural validity of a tax levy, the federal courts have jurisdiction and can grant injunctive and declaratory relief. Rodriguez, supra at 336; Martinez v. U.S., 669 F2d 568 (9th Cir. 1981).

Since it was the distributee whose property was sold, it is the distributee who has the greatest interest in a declaration that the procedures used in the seizure and sale were invalid. The District Court ruled, in effect, that since the Estate was the taxpayer, only the Estate had an interest in the sale, and the only remedy was a claim for refund by the Estate. Under 26 USC §§6901(h) and 7701(a)(14), the distributee is also deemed to be a taxpayer for the purposes of the Internal Revenue Code. In the District Court's grant of summary judgment to the IRS, Appendix B, it commented that "Powelson was personally liable for the estate tax in both his individual and representative capacities. This is directly contradicted by the District Court's comment at Appendix V

that "The court finds that in this case there is no basis for extending the waiver of sovereign immunity to third parties such as Powelson and Chicago Title." Either Powelson the individual is directly liable for payment of the estate tax and is therefore not a third party, or he is not liable for the tax and his property should not have been seized and sold. The District Court's rulings contradict one another, yet the Ninth Circuit failed to address this inconsistency. **If nothing else, this contradiction and inconsistency must be reviewed and overturned by this Court.**

Just as it was improper and illogical for the District Court to dismiss the declaratory judgment and quiet title actions of the individual distributee after the tax sale, so it was equally improper to dismiss those claims brought by the Estate and the distributee in the first action before the sale

An action for refund is an alternative remedy available in addition to a declaration that the sale was procedurally illegal. The declaration of illegality is a precursor to the

remedy of refund. Martinez, supra. This is not a matter of the tax being overpaid in amount, other than the tax collection procedures being illegal. Petitioners contend that when the tax is collected through illegal procedures, the any amount collected is excess. The initial declaration of illegality is what leads to the remedy of refund, rather than the refund being the initial cause of action.

To rule that after the sale the exclusive remedy is a claim for refund is to ignore the fact that the procedures used in the seizure and sale were illegal. Such a ruling, not addressed by the Ninth Circuit, would give credence to the IRS contention that so long as the amount collected is no greater than that which is owing, the method of collection is irrelevant. See, e.g. Van Antwerp v. U.S., 92 F2d 871 (9th Cir. 1937). In other words, such a ruling is an invitation to the Internal Revenue Service to us any illegal means of collection they want, so long as the amount collected is not excessive.

It should be noticed that declarations of illegality in the sale procedures have been dealt with in the courts before. Johnson v. Gartlan, 470 F2d 1104 (4th Cir. 1973) was an action in equity to quiet title to land that had been sold at a tax sale. While the court there refused to set the sale aside as having been ratified by cashing the check for the excess proceeds, the district court there had not dismissed the action on "refund only" grounds. The action was allowed to proceed as a quiet title case without any requirement of filing a claim for refund.

Little River Farms, Inc. v. U.S., 328 F Supp 476 (ND Ga, 1971) was an action by a taxpayer whose property was seized and sold for payment of back income taxes, charging that the injury was caused by noncompliance with the mandatory statutory collection procedures. The court there interpreted the language of the quiet title statute broadly, and stated:

> Since the validity of a sale under § 6335 would case a cloud on the title of the assets, we

> adhere to the view in *Popp v. Eberlein*, 409 F2d 309 (7th Cir., 1969) that the taxpayer's remedy falls under 28 USC § 2410. ... As the Court views the situation, the taxpayer has a right under § 6335 but no remedy for enforcing it except § 2410. 328 F Supp at 479, emphasis added.

The Northern District of Georgia properly allowed the suit to proceed along the lines that the petitioners here have presented their cases since before the tax sale.

B. The Ninth Circuit erred in failing to address the issue (raised by the appellants) of the gap in the chain of title created by the government having seized the interest of the Individual distributee, yet having sold the interest of the Estate which had transferred the property years prior to the sale.

The District Court ruled that once the sale took place, no quiet title action would lie because the government "does not have or claim a mortgage or other lien against the subject property" after the tax sale. Appendix V. On the other hand, the Ninth Circuit has in the past defined quiet title more

generally and suggested that it comprehends a suit to remove a cloud upon the title of a plaintiff. U.S. v. Coson, 286 F2d 453 (9th Cir. 1961). An illegal and improper sale creates a cloud upon the title.

The title given to the purchaser at the tax sale transferred the right, title and interest of the Estate of Clydena M. Gross whereas the property was seized from the individual distributee. The property had been transferred from the Estate to the distributee several years prior to the sale. Therefore the sale did not relinquish the lien of the government on the property which had been seized from the individual. Since the lien was not extinguished at the sale and transfer of whatever title was given, the IRS does have or claim a lien against the subject property.

The more important case where the court allowed a quiet title action to proceed even after the sale of the subject property is Aqua Bar & Lounge, Inc. v. U.S. Dep't. of Treasury, 539 F2d 935 (3rd Cir. 1976). In that case the

district court had dismissed the complaint for lack of jurisdiction, based upon 28 USC § 2201 and 26 USC § 7421. On appeal, the Third Circuit ruled that 28 USC § 1340 in combination with 28 USC § 2410 provided jurisdiction and a waiver of sovereign immunity where, as here, the procedures were challenged, but not the validity of the underlying assessment. "[B]oth the tax lien asserted by the government and the sale ... if indeed invalid, would cause clouds on the title. ... An action to quiet title is the proper method of removing such clouds on title." 539 F2d at 937-38, citations omitted.

The fact that the Third Circuit allowed the quiet title action to proceed and the Ninth Circuit has refused to allow it to proceed creates a conflict among the circuits. S.Ct. Rule 10.1(a).

C. The Ninth Circuit erred in failing to address the issues (raised by the appellants) of the defects in the Levy and the Notice of Intent to Levy prior to the defective delivery of the

Notice of Sale.

Prior to the sale, the government issued to the Estate a 10 day notice of intention to levy upon property held by the distributee. The government argued in support of its motion for summary judgment that the entities were interchangeable since the Personal Representative of the Estate and the individual distributee are embodied in the same human being. On the other hand, had the suit been brought in the name of the wrong entity, the government would have moved to dismiss. Collins v. U.S., 532 F2d 1344 (Ct.Cl. 1976); Hofheinz v. U.S., 511 F2d 661 (5th Cir. 1975); Hanify v. Commissioner, 21 B.T.A. 379 (1930). The distinction between the two entities is important. The persona of personal representative is purely a creation of law and is a separate entity from the distributee of the property, even where embodied in the same human being.

The requirements of 26 USC § 6331(d)(1) were not here satisfied prior to the sale. That subsection makes it

clear that it is the owner of the property who must be given the Notice of Intention to Levy. Notice in this case was given to the Estate. The levy and seizure were of the property of the distributee. Notice to the personal representative, a legally separate entity created by law, does not satisfy the statute, and the procedures used before the sale were invalid. The Ninth Circuit did not reach this issue, but more than just the sale must be set aside - the seizure of the property must also be set aside.

D. Whether the Ninth Circuit erred in ruling that where a tax sale is defective the remedy is a remand for a determination of whether the claim is merely for refund or is more akin to conversion, even after the Ninth Circuit has said "the sale can not stand."

The actions below were based upon improper procedures used by the IRS in the seizure and sale. Such actions arose from injuries caused by noncompliance with the mandatory provisions of the tax collection statutes. The

claims were never properly solely for refund, since the actions of the government were illegal. What the Ninth Circuit ignored was the fact that the distributee had joined in the original action below prior to the sale of his property, and jurisdiction therein was grounded in part on quiet title, not refund. For the Ninth Circuit to now rule that the case must be remanded for a determination of whether the claim is analogous to conversion or purely a refund which would be denied makes no sense, and this Court must review that ruling.

STATUTES INVOLVED

The statutes involved in this matter are set out verbatim in the appendices.

CONCLUSION

The Ninth Circuit has missed crucial points involved in the cases below. In addition, its blanket ruling that no quiet title action will lie after the tax sale is wrong on the facts and sets up a conflict among the circuits. This Court

must therefore review these consolidated actions. in order to avoid such a conflict among the circuits.

Respectfully submitted,

/s/ ROY B. THOMPSON

By:_____

ROY B. THOMPSON
(Counsel of Record)
ROY B. THOMPSON, P.C.
Suite 855
621 SW Morrison
Portland, OR 97205
(503) 224-0831

(3) 92-1227

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ROY B. THOMPSON
(Counsel of Record)
ROY B. THOMPSON, P.C.
SUITE 855
621 SW MORRISON
PORTLAND, OR 97205
(503) 224-0831

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APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GORDON E. POWELSON, an individual, and CHICAGO TITLE INSURANCE COMPANY OF OREGON, an Oregon corporation,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

and

Gordon E. Powelson, Personal Representative of the ESTATE OF CLYDENA M. GROSS,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Docket Nos. 89-35735, 90-35005
Filed: December 8, 1992

Before: Eugene A. Wright, Cecil F. Poole and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

ORDER

The opinion filed October 23, 1992, slip op 12783-96 is amended as follows:

At slip op. 12794 the following citation and parenthetical

expression is deleted: "*See United States v. Hardesty*, 958 F.2d 910, 912 (9th Cir. 1992)(en banc review is not required when the conflict can be resolved or avoided)."

The deleted citation and parenthetical expression are replaced with the following citation and parenthetical expression:

> *Cf. United States v. Hardesty*, No. 90-30260, slip op. at 12678 (9th Cir. Oct. 22, 1992)(en banc)(per curiam) (en banc review required "'unless the prior decisions [alleged to be in conflict] can be distinguished.'" (quoting *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987)(en banc), *cert. denied*, 485 U.S. 989 (1988)).

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Poole and Thompson have voted to reject the suggestion for rehearing en banc, and Judge Wright so recommends.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

OPINION

THOMPSON, Circuit Judge:

Appellant Gordon E. Powelson sued the government in the district court in Oregon, seeking a refund of federal estate taxes under 26 U.S.C. § 7422. Powelson argued that the Internal Revenue Service (IRS) improperly seized and sold his property to satisfy the tax liability of his mother's estate without first complying with the mandatory notice requirements of 26 U.S.C. § 6335(b). After satisfying the estate's tax liability, the IRS remitted the excess proceeds of the sale to Powelson.

Powelson also filed an action in the district court for a declaratory judgment and to quiet title to the property. He sought to have the sale set aside and the property returned to him. In that action he asserted substantially the same facts and contentions he had asserted in the refund action.[1]

The district court granted summary judgment in favor of the government in the refund action and dismissed the declaratory judgment and quiet title action for lack of subject matter jurisdiction. Powelson appeals. We have jurisdiction under 28 U.S.C. § 1291. We reverse the district court's grant of summary judgment in the refund action, and remand that action to the district court for further proceedings. We affirm the district court's dismissal of the declaratory judgment and quiet title action.

DISCUSSION

A. The Refund Action

Under 26 U.S.C. § 6335(b), a taxpayer must be notified of the sale of his property in the manner prescribed by 26 U.S.C. § 6335(a). Section 6335(a) provides:

> (a) **Notice of seizure.** - As soon a practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall

---

[1] Powelson filed the refund action on behalf of his mother's estate, in his capacity as the estate's representative. He filed the declaratory judgment and quiet title action in his individual capacity as a distributee of the estate.

> contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

26 U.S.C. § 6335(a). "[T]he language and purpose of §6335(a) and §6335(b) require that the government be held accountable for failure to strictly comply with the procedures prescribed by the two provisions." *Goodwin v. United States*, 935 F.2d 1061, 1065 (9th cir. 1991). "[A]bsent literal compliance with [these] provisions, the government sale of land cannot stand." *Reece v. Scoggins*, 506 F.2d 967, 971 (5th Cir. 1975).

It is undisputed that two IRS agent went to Powelson's residence to serve him with notice of the sale of his property. The agents had been to Powelson's residence before and knew he lived there. Powelson was not at home. The agents returned to their office without leaving the notice. The IRS made no further attempt to personally serve Powelson with the notice of sale. Instead, it mailed the notice to him by both regular and certified mail. Powelson received this notice.

The IRS contends giving Powelson notice by mail was permissible under sections 6335(a) and (b) because he could not be readily located for personal service. Powelson argues the government's contention is foreclosed by our decision in *Goodwin*.

In *Goodwin*, two IRS agent went to the property owner's residence and attempted to serve him personally with notice of the levy and seizure of his property. "[H]e was not there so they mailed the notice by certified mail." *Goodwin*, 935 F.2d at 1063. The property owner received the notice a few days later. Notice of sale was later "posted," and when no bidders appeared at the sale, the property was sold to the government for the minimum bid.

[1] When the government sought to resell the property, the property owner sued to enjoin the sale. The government argued that because the property owner had received actual notice of the seizure and sale of his property, he had suffered no

prejudice and could not object to what was at most "de minimis noncompliance" with section 6335. *Id.* at 1064. We rejected that argument and held that strict compliance with the statute was required. *Id.* at 1065. The property owner had not been personally served with the notices under 26 U.S.C. §§6335(a) and (b), and although he had a dwelling within the internal revenue district where the seizure was made, the government had not left the notice there as authorized by the statute.

[2] The government in *Goodwin* did not argue that service by mail was permissible because the property owner could not be readily located. Here, it does. It contends that the IRS's unsuccessful attempt to serve Powelson at his home established that he could not be readily located for personal service, and therefore service by mail was permissible under the statute.

[3] We reject the government's argument, because it has not shown that the IRS made a reasonable attempt to personally serve Powelson. The IRS tried once to serve Powelson at his residence. He wasn't there, so the IRS agents simply left. The agents did not leave the notice at Powelson's residence, which would have satisfied the notice requirement of 26 U.S.C. §6335(a). They did not leave a card asking Powelson to contact them, nor did they make any attempt to reach him by telephone, nor did they try again to serve him. Even under the arguably low "readily located" standard of the statute, the IRS's lone attempt at personal service was perfunctory at best. It did not establish that Powelson could not be readily located for personal service.[2]

[4] Although the IRS has a number of options for giving

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[2] The parties do not argue, nor do we decide, whether the efforts required of the IRS under section 6335 must rise to the level of "due diligence" required under various state statutes authorizing substituted service of process when a party cannot be located. *See, e.g., Jaffe v. Vasilakos*, 369 S.E.2d 640 (N.C.App. 1988); (plaintiff must exercise due diligence in attempting to locate defendant before substitued service is allowed); *Carlson v. Bos*, 740 P.2d 1269 (Utah 1987)(same); *PacAmOr Bearings, Inc. v. Foley*, 460 N.Y.S.2d 662 (1983)(same).

notice to the property owner under 26 U.S.C. §§6335(a) and (b), strict compliance with the statute is required. If the IRS wishes to give notice by mail, it must satisfy the statutory preconditions for doing so. Here, the IRS did not satisfy these conditions.

The government relies on *Van Antwerp v. United States*, 92 F.2d 871, 873 (9th Cir. 1937), in arguing that even if Powelson's taxes were illegally collected, he is not entitled to a refund under section 7422 because he has not shown any overpayment of taxes. In *Van Antwerp*, the taxpayer sought a refund of money seized from his bank account to satisfy his tax liability based on the IRS's failure to provide him with adequate notice of the deficiency. In holding that the taxpayer was not entitled to a refund, we stated that "[a] taxpayer must show, in an action for refund of taxes illegally collected, that he does not owe the tax. We hold this to be true regardless of the legality of the Commissioner's action in collecting the alleged deficiency...." *Id.* at 873.

In *Martinez v. United States*, 669 F.2d 568, 569 (9th Cir. 1981), however, we recognized an exception to the general rule discussed in *Van Antwerp* when the taxpayer's action more closely resembles a tort claim for conversion than a traditional refund action. There, the taxpayer sought a refund of money and property which the IRS had seized and sold to satisfy his tax liability. Although the taxpayer admitted owing the taxes, he argued that the IRS failed to provide him with sufficient notice before seizing his property. After recognizing that a refund would ordinarily not be allowed in such a situation, we nevertheless held that a refund was warranted because the taxpayer was "challenging only the manner in which the government took his property," and not the amount of his tax liability. *Id.* at 569.

Martinez and *Van Antwerp* are not irreconcilable. In *Van Antwerp* we were never presented with, nor did we consider, the possibility that an exception to the overpayment requirement in refund actions could exist based on the nature of the action itself. Having considered that argument for the first time in *Martinez*, we held that a refund may be obtained, even when the taxpayer has shown no overpayment, if his action so closely resembles an action

for tortious conversion that to deny relief would be inequitable. We conclude these two cases are sufficiently dissimilar that an en banc review is unnecessary. *Cf. United States v. Hardesty*, No. 90-30260, slip op. at 12678 (9th Cir Oct. 22, 1992)(en banc)(per curiam)(en banc review required "'unless the prior decisions [alleged to be in conflict] can be distinguished.'")(quoting *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987)(en banc), *cert. denied,* 485 U.S. 989 (1988)).

Powelson does not challenge the calculation of his tax liability. Instead, he challenges the process by which the IRS collected his taxes and seeks a return of his real property which was sold to satisfy this liability. Whether his claim is sufficiently analogous to a tort action for wrongful conversion under *Martinez*, or whether his claim is for a refund to which he is not entitled under *Van Antwerp*, or whether there may be other impediments to his recovery are all questions best left to the district court for its initial determination on remand.

B. Declaratory Judgment and Quiet Title Action

In the declaratory judgment and quiet title action, Powelson and Chicago Title Insurance Company of Oregon sought to have the government's resale of the property set aside, the purchase price refunded to the buyer, and the property returned to Powelson. The gravamen of these claims, as in the refund action, is the assertion that the government's seizure and sale of the property was wrongful.

[5] The declaratory judgment action is barred by the terms of 28 U.S.C. §2201. While this section gives the district court jurisdiction over cases seeking declaratory relief, disputes "with respect to Federal taxes" are excluded. Because the declaratory judgment action involves federal taxes, the district court did not have subject matter jurisdiction over this claim. *Hughes v. United States*, 953 F.2d 531, 536-37 (9th Cir. 1992).

[6] Nor may the quiet title action be maintained. The asserted basis for subject matter jurisdiction over this action is 28

U.S.C. §2410. Section 2410(a) provides that the United States may be named as a party in an action to quiet title to real property on which the United States has or claims a mortgage or other lein. 28 U.S.C. §2410(a). However, as we stated in *Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990), "[a] taxpayer may not use a section 2410 action to collaterally attack the merits of an assessment." To the extent the quiet title action challenges the merits of the assessment, jurisdiction is lacking under section 2410. *Hughes*, 953 F.2d at 538. Moreover, the government held no interest in the property when the quiet title action was filed. For this reason, jurisdiction was also lacking. *Id.; cf. Kulawy v. United States*, 917 F.2d 729, 733-34 (2d Cir. 1990)(court had jurisdiction under section 2410 where government still had lien on property at the time suit was commenced, even though the property had been sold).

CONCLUSION

We reverse the grant of summary judgment against Powelson in his refund action. We remand the refund action to the district court to determine what, if anything, Powelson may be able to recover on that claim.

We affirm the district court's dismissal of Powelson's and Chicago Title's declaratory judgment and quiet title action. The district court lacked subject matter jurisdiction of these claims.

AFFIRMED in part, REVERSED in part, and REMANDED to the district court. Each party will bear its own costs on appeal in these consolidated appeals.[3]

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[3] Powelson and Chicago Title raise a number of other challenges to the seizure and sale of the property. In view of our resolution of these appeals, we do not address these additional challenges.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR
Filed September 21, 1989

ORDER

IT IS HEREBY ORDERED that defendant's motion for summnary judgment (#109) on all five of plaintiff's claims is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (#113) is DENIED.

DATED this 20 day of September, 1989.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendant and against plaintiff.

DATED this 21 day of September, 1989.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

OPINION

FRYE, Judge.

The matters before the court are the cross-motions for summary judgment of defendant, United States of Amerrica (the government), (#109) and of plaintiff, Gordon E. Powelson, Personal Representative of the Estate of Clydena M. Gross, (#113) pursuant to Fed. R. Civ. P. 56. Powelson brings this action for a refund of federal estate taxes, interest and penalties collected by the government. Powelson also requests accrued interest on the collected sum and attorney fees pursuant to 26 U.S.C. § 7430. Powelson does not contest the accuracy of the amount of the tax assessed. Powelson contends only that the tax was collected in an illegal manner, necessitating a refund.

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence o any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine isue of fact should be resolved against the oving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976).

UNDISPUTED FACTS

On July 29, 1980, Clydena M. Gross died testate. At the time of her death, Gross owned certain real property in Multnomah County, Oregon (hereinafter "the real property"). The will of Gross was probated in the Circuit Court of the State of Oregon for the County of Washington. Powelson was appointed the Personal Representative of the Estate of Clydena M. Gross.

Powelson was also the beneficiary of the real property at issue herein.

On August 17, 1981, the government assessed federal estate taxes and interest against the Gross estate in the sum of $147,492.24. On January 20, 1982, the Washington County Probate Court ordered that the real property be distributed to Powelson nunc pro tunc July 29, 1980, the date of Gross' death. The order of distribution stated that Powelson took the property "subject to all taxes and liabilities which have accrued since July 29, 1980."

On June 12, 1987, the government served Powelson, as personal representative, with a Notice of Estate Tax Due on Gross' estate and demanded payment on or before June 22, 1987. Powelson did not pay the tax.

On July 1, 1987, the government served Powelson, as the distributee o the real property, with a Statement of Levy. The Statement of Levy informed Powelson that his property was levied upon to pay estate taxed owed. On that same day, the government also served Powelson with a Notice of Seizure of the real property, informing him that the property had been seized in order to satisgy the unpaid estate tax liability.

On February 5, 1988, the government served Powelson, as Personal Representative of the Estate of Clydena M. Gross, with a Notice of Intention to Levy. On February 16, 1988, a Notice of Levy was served on Powelson, as the distributee of the real property of the estate of Clydena M. Gross. Powelson was also served with a Notice of Seizure of the real property on that same date. The Notice of Seizure states that the taxes shown thereon are due from the estate of Clydena M. Gross, Gordon E. Powelson, Distributee.

On February 29, 1988, the government served Powelson, as distributee, with a Notice of Release from the July 1, 1987 Statement of Levy. However, pursuant to the Notice of Levy of February 16, 1988, the goverment served Powelson, as personal representative of the Gross Estate, with a Seizure and Sale Worksheet stating the minimum bid price for the real property on March 9, 1988.

On March 23, 1988, two government representatives went to Powelson's residence to serve him with a Notice of Sealed Bid Sale. Unable to locate Powelson at his home, the government representative, Revenue Officer James Bagby, mailed the Notice

of Sealed Bid Sale to Powelson by regular and by certified mail.

On or about March 28, 1988, Powelson received the Notice of Sealed Bid Sale. It was addressed to him as distributee. The Notice of Sealed Bid Sale stated that the interest in the real property offered for sale is " [o]nly the right, title, and interested of the Estate of Clydena M. Gross, Gordon E. Powelson-Distributee."

Bids were accepted pursuant to the Notice of Sealed Bid Sale. On April 21, 1988, the bids were opened. Powelson attended the opening of the bids. The real property was sold for $400,000, an amount greater than that needed to pay the federal estate tax, interest and penalties owed. The government sent a check to Powelson as distributee for the amount of the sales proceeds left after payment of taxes. Powelson placed the check in a safety deposit box.

CONTENTIONS OF THE PARTIES

Powelson challenges the validity of: (1) the Notice of Intention to Levy of February 5, 1988; (2) the Notice of Sealed Bid Sale of March 23, 1988; and (3) the Notice of Levy of February 16, 1988. The government cross-moves for summary judgement on

each of Powelson's claims for relief.

DISCUSSION

1. Notice of intention to Levy of February 5, 1988

Powelson challenges the validity of the Notice of Intention to Levy of February 5, 1988, and hence the sale of the real property.

Title 26 U.S.C. § 6331 provides: "If any person liable to pay any tax neglects or refuses to pay ...it shall be lawful for the [government] to collect such tax...by levy upon all property and rights to property...belonging to such person." The term "levy" includes the "power of distraint and seizure by any means." 26 U.S.C. §6331(b). However,prior to a levy, the government must give notice of its intent to exercise that power. The government may levy upon "property of any person with respect to any unpaid tax only after [it] has notified such person in writing of [its] intention to make such levy." 26 U.S.C. § 6331(d)(1).

In this case, the Notice of Intention to Levy dated February 5, 1988 stated, in pertinent part:

> Estate of Clydena M. Gross
> Gordon E. Powelson - Personal Representative

.....

> Although we have sent you notices to pay your federal tax liability shown below, we have no record of receiving the amount due. This letter is your notice that we have no record of receiving the amount due. This letter is your notice that we intend to levy upon your property or rights to property in accordance with section 6331(d) of the Internal Revenue Code.
>
> .....
>
> If you do not comply with this notice , we may take enforcement action without any further notice to you. We may file a notice of Federal tax lien which is public notice to your creditors that a tax lien exists against your property. We may serve a notice of levy on your employer for salary or wages you are due, and may levy on any bank accounts, receivables, commissions, or other kinds of income you have. We may also seize your property or rights to your property, such as automobiles, and sell it to satisfy your tax liability.

Powelson contends that the Notice of Intention to Levy of February 5, 1988 was defective because it was given to him in his capacity as personal representative of the Estate of Clydena M. Gross rather than in his capacity as distributee of the property.

The government argues that it gave proper notice to Powelson as the personal representative of the Estate of Clydena M. Gross because he was a "person liable to pay any tax" pursuant to 26 U.S.C. § 2002. The government also argues that the

distinction between Powelson's status as personal representative of the Estate of Clydena M. Gross and as the distributee of the real property of the Estate of Clydena M. Gross is legally insufficient because he received actual notice of the government's intent to levy upon the property.

Powelson was personally liable for the estate tax in both his individual and representative capacities. Powelson,in his capacity as Personal Representative of the Estate of Clydena M. Gross, was responsible for payment of the federal estate taxes due by reason of 26 U.S.C. § 2002. Powelson, in his capacity as distributee of the Estate of Clydena M. Gross, is personally liable for the payment of federal estate taxes not paid by Powelson in his capacity as the Personal Representative of the Estate of Clydena M. Gross. 26 U.S.C. § 6324(a)(2).

The court concludes that in this case, Powelson received sufficient notice. The notice advised Powelson that the government would levy on his real property if he refused to pay the taxes owed. Furthermore, Powelson was well-advised of the tax liability because he was represented by counsel and already engaged in this litigation concerning the property of the first levy

upon the real property.

Summary judgment on Powelson's Claim One is therefore granted in favor of the government.

2. Statute of Limitations - Notice of Levy of February 16, 1988

Powelson argues that the second Notice of Levy of February 16, 1988 was invalid because it was issued after the expiration of the statute of limitations.

Title 26 U.S.C. § 6502(a)(1) provides for a six-year statute of limitations on service of a notice of levy to collect an unpaid tax liability. The six-year period generally commences with the assessment of the tax. In this case, the estate tax liability was assessed on August 17, 1981. However, when the assets of a decedent's estate remain subject to a probate court's jurisdiction, the statute of limitations does not commence to run until six months after the assets are released for distribution. See 26 U.S.C. § 6503(b); United States v. Silverman, 621 F.2d 961 (9th Cir. 1980), cert. denied, 450 U.S. 913 (1981).

In this case, the assets of the estate, which included the real property at issue, were not released by the probate court for

distribution until January 20, 1982. The fact that the distribution was a nunc pro tunc order is irrelevant to the statute of limitations inquiry; the assets of the estate remained subject to the probate court's jurisdiction until January 20, 1982.[1] Thus, the government had an additional six months, or until July 20, 1988, to serve a notice of levy on Powelson. The Notice of Levy was served on February 16, 1988, clearly within the time allowed.

Accordingly, the tolling provisions applies and summary judgement on Powelson's Claim Three is granted in favor of the government.

3. Notice of Sale

Powelson's alleges that the manner in which the government conducted the sale of the real property was not in compliance with statutory procedures and is therefor void.

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[1] Powelson argues that the six-month tolling provision does not apply because the entry of the probate court's order of distribution, nunc pro tunc, operated to disburse the property to him effective as of the date of decedent's death, July 29, 1980. However, the clear import of the nunc pro tunc order is to give effect to the general rule that legal title to the decedent's property immediately vests in the devisees upon the decedent's death. The distribution order does not imply that Powelson was also entitled to the use and enjoyment of the property from that date.

Specifically, Powelson claims that the Notice of Sealed Bid Sale was: 1) improperly delivered; and 2) defective on its face.

a. Delivery of Notice of Sale

The IRS is required to give notice to the owner prior to the sale of the seized property. See 26 U.S.C. § 6335 (b).

> As soon as practical after the seizure of property, notice in writing shall be give to the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address.

26 U.S.C. § 6335 (a)[2]

In this case, on March 23, 1988, employees of the Internal Revenue Service attempted to deliver a copy of the notice of sale to Powelson at his residence. However, they did not find Powelson at his home. Instead of taping a copy of the notice of sale to his door, the notice of sale was mailed to Powelson, both by regular and certified mail. Powelson acknowledges receiving the notice of

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[2] Section 6335(b) also requires a publication and posting of the notice of sale. Powelson does not claim that the IRS failed to comply with these publication and posting requirements.

sale on March 28, 1988, approximately one month prior to the sale.

The general rule is that the notice provisions of section 6335, which permits the sale at public auction of a taxpayer's land to satisfy a tax deficiency, must be strictly construed. Reece v. Scoggins, 506 F.2d 967, 970-71 (5th Cir. 1975). The "[g]overnmental seizure and sale of land is one of the most potent weapons in the government's tax collection arsenal." Id. at 971. Therefore, "absent literal compliance with its provisions, the government sale of land cannot stand." Id.

The mailing of the notice, even done in a timely fashion, satisfies the statute only "if the owner cannot be readily located, or has no dwelling or place of business within such district." Powelson argues that failing to tape the notice to his door, the government's single attempt to locate him to deliver the notice of sale did not satisfy the requirements of due diligence.

The internal operations manual of the Internal Revenue Service provides:

> The original notice [of sale] will be delivered to the taxpayer personally. If personal service has been attempted but could not be accomplished, the notice will be sent by Certified Mail, Return Receipt Requested to taxpayer's last known address.

Internal Revenue Manual §5356.1(2) (1980). The government representatives did attempt to serve Powelson personally, but were unable to readily locate him or anyone else at his home. Therefore, in place of personal service, they mailed the notice to Powelson by both regular and certified mail. Under these circumstances, the court finds that the government exercised due diligence in its efforts to notify Powelson of the upcoming sale. In addition, the court finds that the government complied with the notice requirements as stated in both the statute and the IRS manual.

The notice requirements of section 6335 are designated to protect the taxpayer by giving him an opportunity to be present at the tax sale and to bid on the property. Reece, 506F.2d at 971 (citations omitted). In this case, the purpose of the statute was satisfied. Powelson received actual written notice of the sale in sufficient time for him and his attorney to actually appear at the sale. Accordingly, summary judgment on Powelson's Claim Two is granted in favor of the government.

b. Identity of Interest

Powelson next alleges that the sale of the property was

improperly conducted because the Notice of Sale was defective on its face. Powelson argues that the right, title and interest offered for sale in the notice was that of Powelson as "distributee" rather than that of the Estate of Clydena M. Gross or of Powelson as the personal representative. The government responds that the notice of sale properly identified the property interest which was being sold.

Treasury Regulation § 301.6335-1 (b)(1) provides that the notice of the sale "shall expressly state that only the right, title, and interest of the delinquent taxpayer in and to such property is to be offered for sale." In this case, the notice of sale stated: "[o]nly the right, title, and interest of Estate of Clydena M. Gross - Gordon E. Powelson, Distributee" was being offered for sale. Therefore, summary judgement on Powelson's Claim Five is granted in favor of the government.

4. Validity of Statement of Levy of February 16, 1988

Powelson next argues that the Statement of Levy of February 16, 1988 was invalid due to the existence of the first Statement of Levy of July 1, 1987. Specifically, Powelson argues that because the first Statement of Levy was issued, the

government held the property and thus it could not effectively levy against the property a second time.

Prior to the issuance of the second Statement of Levy of February 16, 1988, Powelson brought a civil action for a declaration of the first Statement of Levy of July 1, 1987 was void for failure to provide a notice of intent to levy. In order to render moot the issue of the validity of the first Statement of Levy of July 1, 1987, the government issued the Notice of Intention to Levy of February 16, 1988. This was not improper and did not operate to render the second levy ineffective or invalid. See Commissioner of Internal Revenue Service v. Shapiro, 424 U.S. 614, 622 n.7 (1976). Summary judgement on Claim Four is therefore granted in favor of the government.

5. Failure to State a Cause of Action

The government argues that Powelson's Fourth Amended Complaint fails to state a claim because Powelson does not dispute the fact that he is liable for the amount of the estate tax assessed. Consequently, the government claims that it did not retain any money which rightfully belonged to Powelson and that Powelson is not entitled to a refund and cannot maintain this action.

The district court has original jurisdiction over "any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. § 1346 (a)(1). If the Internal Revenue Service fails to comply with the notice provisions governing tax sales of land, or otherwise conducts the tax sale in an improper manner, the taxpayer has a remedy pursuant to section 1346 (a)(1). If the estate tax was illegally assessed or collected, as alleged, Powelson would be entitled to a return of the property upon refund of the purchase price to the buyers.[3] This remedy arises from the illegal sale and not from any dispute as to the amount of tax owed. On this basis, the government's motion for summary judgement on the grounds Powelson's Fourth Amended Complaint fails to state a claim is denied.

CONCLUSION

Based on the foregoing discussion, the government's motion

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[3] Of course, at that point, the IRS is free to use other appropriate procedures to collect any unpaid tax liability from Powelson.

for summary judgement on all five of Powelson's claims is granted.

Powelson's motion for summary judgement is denied.

DATED this 20 day of September, 1989.

HELEN J. FRYE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

OPINION AND ORDER

FRYE, Judge:

The matter before the court is plaintiff, Gordon Powelson's, motion for an order regarding the appropriate disposition of the check issued to him by the United States Treasury as surplus proceeds from the tax sale of real property (#106).

Powelson filed this action prior to the government's sale of real property owned to him to satisfy estate taxes claimed to be owing to the United States. The action in large measure challenges the validity of the tax sale of Powelson's real property. In April, 1989, the government sent Powelson a check drawn on the United

States Treasury in the amount of $93,186.48.

Powelson has not cashed the check out of a concern that to cash the check would be to ratify the tax sale he is challenging. The check remains locked away in a safety deposit box. Powelson, however, would like interest to be earned on the funds and asks the court for a determination that depositing the check in an interest-bearing escrow account does not constitute ratification of the sale or for other guidance as to the proper disposition of the check. The government does not oppose Powelson's motion.

Powelson cites to Johnson v. Gartlan, 470 F.2d 1104 (4th Cir. 1973), as the basis for his concerns. The Johnson case stands for the proposition that when a plaintiff brings a suit seeking equitable relief, he must show that he acted in a legally responsible manner. In Johnson, the taxpayer's land was sold in January, 1963 to satisfy taxes owed. In October, 1964, the government sent the taxpayer the surplus proceeds from the tax sale. The taxpayer endorsed the check and kept the money without questioning or contesting the sale. After the taxpayer's death, his heir sought to challenge the validity of the sale through a suit in equity to quiet title filed in October, 1969, six years after the tax sale. Although

the tax sale was found to be technically invalid, the Court of Appeals refused to grant relief under those circumstances. See also Howard v. Adle, 538 F. Supp. 504, 508 (E.D.Mich. 1982) (plaintiffs failed to act with sufficient promptness after tax sale to redeem property sold, citing to Johnson v. Gartlan).

Whether Powelson acted promptly in challenging the government's actions to collect its claimed taxes in not at issue. If Powelson chooses to place the check for surplus proceeds in an interest-bearing escrow account, that action will not constitute ratification of the tax sale.

IT IS SO ORDERED.

DATED this ____ day of July, 1989.

_____

Helen J. Frye
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

FOURTH AMENDED COMPLAINT: REFUND

COUNT ONE

DEFECTIVE LEVY

1.

Plaintiff Gordon E. Powelson is Personal Representative for the Estate of Clydena M. Gross, deceased, and is a citizen of the State of Oregon. The decedent's social security number was 539-01-0464.

2.

Defendant United State of America was and is a public body acting by and through its Secretary of Treasury and its

Internal Revenue Service ("IRS"). In all matters alleged, defendant acted by and through its IRS.

3.

This is an action for recovery of federal estate tax and interest erroneously or illegally assessed and collected. Jurisdiction is invoked under 28 U.S.C. 1346(a)(1).

4.

On January 20, 1982, nunc pro tunc July 29, 1980, there was a partial distribution to Gordon E. Powelson, an individual, of the assets of the Estate of Clydena M. Gross, sufficient to pay the estate taxes.

5.

On June 12, 1987, defendant issued to plaintiff a Notice of Estate Tax due on the Estate of Clydena M. Gross. By that June 12, 1987 notice, defendant demanded immediate payment in the amount of $288,925.37, which included interest through June 22, 1987. A true copy of that Notice and Demand is attached and incorporated as Exhibit 1.

6.

On July 12, 1987, defendant issued to Gordon E. Powelson

the distributee-owner of the assets referred to in paragraph 4 above, a Statement of Levy (IRS Form 668-B) (hereinafter "the first levy"). The State of Levy states that an assessment was made on August 17, 1981 in the amount of $147,492.24. A true copy of that Statement of Levy is attached and incorporated as Exhibit 2. No notice of intention to levy was issued to either plaintiff or to Gordon E. Powelson, the distributee-owner, prior to the first levy.

7.

On July 1, 1987, defendant issued to Gordon E. Powelson, the distributee-owner a Notice of Seizure (IRS Form 2433) of real property in Multnomah County, State of Oregon. That July 1, 1987 Notice of Seizure showed past estate taxes due in the amount of $290,268.09. A true copy of that July 1, 1987 Notice of Seizure is attached and incorporated as Exhibit 3.

8.

On February 16,1988, defendant issued to Gordon E. Powelson, the distributee-owner a Statement of Levy (IRS Form 668-B) (hereinafter "the second levy"). This second Statement of Levy states that an assessment was made on August 17, 1981 in the amount of $147,492.24. A true copy of this second Statement of

Levy is attached and incorporated as Exhibit 4.

9.

No notice of intention to levy was addressed to Gordon E. Powelson, the distributee-owner of the property, prior to the second levy.

10.

On February 16, 1988, defendant issued to Gordon E. Powelson, the distributee-owner, a Notice of Seizure (IRS Form 2433) of real property in Multnomah County, State of Oregon. This second Notice of Seizure showed past due estate taxes in the amount of $306,421.72). A true copy of this second Notice of Seizure is attached and incorporated as Exhibit 5.

11.

On February 29, 1988, defendant issued to Gordon E. Powelson, the distributee-owner, a Release of Levy (IRS Form 2433). This release of levy released the first levy of July 1, 1987 (Exhibit 2). A true copy of the Release of Levy is attached and incorporated as Exhibit 6.

12.

On March 9, 1988, defendant issued to plaintiff a Seizure

and Sale Worksheet (IRS Form 4585) showing a tax liability in the amount of $311,825.95. A true copy of the Seizure and Sale Worksheet is attached and incorporated as Exhibit 7.

13.

Because 26 USC 6331(d) (i) requires that notice of intention to levy must be given to the property owner prior to levy, there was not valid levy, and the purported levy must be set aside.

14.

Without a valid and enforceable levy the sale by defendant of the subject property is a taking of property without process in violation of Amendment V of the U.S. Constitution.

15.

Plaintiff is entitled to a refund of the money collected at the sale pursuant to the defective levy, because thereby plaintiff has overpaid the estate tax in the amount of $314,346.78

COUNT TWO

DEFECTIVE NOTICE OF SALE -- DELIVERY

16.

Plaintiff realleges and reincorporates paragraphs 1 through

15 above.

17.

On March 18, 1988, by mail, delivered by a postal employee, defendant issued a Notice of Sealed Bid Sale (IRS Form 2434-A) in the name of distributee-owner, addressed to Gordon E. Powelson -- Distributee, to be held April 21, 1988. A true copy of the Notice of Sealed Bid Sale is attached and incorporated as Exhibit 8.

18.

A sale of the subject property was held April 21, 1988, for the sum of $400,000. The sealed bid sale was held at the IRS offices in Oregon City, Oregon.

19.

26 USC 6335(b) requires that Notice of Sale shall be given to the owner of the property by the Secretary of the Internal Revenue Service.

20.

Notice of Sale provided by a representative of the Postal Service is acceptable only when the owner cannot be readily located, or has no dwelling or place of business within the relevant

Internal Revenue district. The distributee-owner of the property resides in the relevant district. The IRS delivered many of the notices in person, demonstrating that the property owner could have been readily located.

21.

The collection of taxes alleged to have been owing was pursuant to a sale void ab initio.

22.

Plaintiff filed a claim for refund of the money collected by defendant of the aforementioned sale. A copy of the claim for refund is attached and incorporated as Exhibit 9. A disallowance date October 28, 1988, of the claim for refund was received by plaintiff November 2, 1988. A true copy of the disallowance of the refund claim is attached and incorporated as Exhibit 10.

23.

Plaintiff is entitled to a refund of the money collected at the void sale, because thereby plaintiff has overpaid the estate tax in the amount of $314,346.78

COUNT THREE

STATUTE OF LIMITATIONS

24.

Plaintiff realleges and reincorporates paragraphs 1 through 15, and 17 and 22 above.

25.

26 U.S.C. 6502(a) provides a six year statute of limitations for levying upon property after assessment. The second levy was asserted more than six years from the date defendant claims to have made the assessment, and more than six years after the effective date of the release of the property from probate.

26.

The second levy and seizure were issued after such a levy became unenforceable due to lapse of time under the statute.

27.

Even assuming, arguendo, that the statute of limitations did not run until July 20, 1988, no valid levy, first or second, was issued by defendant within that time, and so no valid collection occurred in the applicable period.

28.

Because of the statute of limitations for collection has

clearly expired, no valid levy could now issue, and no further collection actions could now take place.

29.

Plaintiff is entitled to a refund of the money collected at the sale pursuant to the invalid levy, because thereby plaintiff has overpaid the estate tax in the amount of $314,346.78.

COUNT FOUR

SECOND LEVY IMPOSSIBLE

30.

Plaintiff realleges and incorporates paragraphs 1 through 15, 17 and 22 above.

31.

Defendant served the second Notice of Intent to Levy on February 5, 1988. Defendant thereby attempted to levy a second time while defending the first levy. Defendant has acted in bad faith by defending the first levy while serving Notice of Intent to Levy for the second time.

32.

Defendant issued to the distributee a Notice of Seizure and Statement of Levy on February 16, 1988, after a seizure and levy

had already been issued.

33.

With the first, also invalid, levy and seizure in place there was legally no property, outside of that already in the hands of defendant, for defendant to levy upon. The attempt to levy while another purported levy was in place amounts to an unreasonable, void and untenable position on the part of defendant.

34.

Plaintiff is entitled to a refund of the money collected at the sale of property purportedly held pursuant to the second levy, because thereby plaintiff has overpaid the estate tax in the amount of $314,346.78.

COUNT FIVE

DEFECTIVE NOTICE OF SALE -- INTEREST SOLD

35.

Plaintiff realleges and reincorporates paragraphs 1 through 15, 17 and 22 above.

36.

Treasury Reg. Section 301.6335-1 requires that the Notice of Sale "shall expressly state that only the right, title and interest

of the delinquent taxpayer in and to such property is to be offered for sale." The present Notice of Sale was defective in that it offered for sale the right, title and interest of Gordon E. Powelson, the distributee-owner of the property.

37.

Plaintiff is entitled a refund of the money collected pursuant to the invalid and defective Notice of Sale, because thereby plaintiff has overpaid the state tax in the amount of $314,346.788.

WHEREFORE, plaintiff demands judgment in the amount of $314,346.78, plus interest and costs allowed by law, and such other relief as the Court may deem just, including the award of attorney's fees under 26 USC Section 7430.

_____
ROY B. THOMPSON, OSB #82501
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

Civil No. 87-952-FR

FRYE, Judge:

The matters before the court are:

1) plaintiff's motion for clarification or in the alternative reconsideration (#92); and

2) defendants's motion to strike the third amended complaint (#98).

BACKGROUND

On January 17, 1989, the court entered an order granting plaintiff's motion to file an amended complaint "to the extent that

plaintiff seeks to file a refund claim." Plaintiff moves for clarification of this order asserting that the minute entry applies only to the claims of the plaintiff acting as personal representative and leaves the declaratory judgment and quiet title action intact as to plaintiff acting as distributee. Based upon this assertion, plaintiff filed a third amended complaint stating a claim for declaratory judgment and quiet title on behalf of plaintiff acting as distributee and a refund claim on behalf of plaintiff acting as personal representative. The government moves to strike the third amended complaint on the grounds that it goes beyond the amendment allowed by the court's order of January 17, 1989.

RULING

On January 17, 1989, the court ruled that plaintiff may file an amended complaint to state a claim for a tax refund. The third amended complaint goes beyond this. Therefore, plaintiff's motion for reconsideration (#92) is denied, and defendant's motion to strike the third amended complaint (#98) is granted. Plaintiff, acting as personal representative, has ten days to file an amended

complaint stating a claim for a tax refund.

IT IS SO ORDERED.

DATED this 12th day of April, 1989.

Helen J. Frye
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

REQUEST FOR EXPEDITED HEARING ON MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE RECONSIDERATION

Plaintiffs herein respectfully request an expedited hearing on their Motion for Clarification filed herewith. This request is supported by the facts contained in the Affidavit of Roy B. Thompson filed with the Motion for Clarification.

DATED this ___ day of _____, 1989.

Respectfully submitted,

_____
Roy B. Thompson, OSB # 82501
Attorney for Plaintiffs

MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE RECONSIDERATION

(ORAL ARGUMENT REQUESTED)

Plaintiffs respectfully move this Court for clarification of the Order of January 17, 1989, partially denying Plaintiffs' Motion for Leave to File Third Amended Complaint, and in the alternative for reconsideration.

This motion is supported by the affidavit of Roy B. Thompson and the Memorandum filed herewith.

DATED this _____ day of _____, 1989

Respectfully submitted,

_____

Roy B. Thompson, OSB # 82501
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

Date: 1/19/89

Title: Powelson v USA

DOCKET ENTRY

Record of order granting pltf's motion to file an amended complt to the extent that pltf seeks to file a refund claim consistent w/ this Court;s opinion dated Sept. 12, 1988 and denied as to the remaining counts.

Order extending completion of discovery date to April 14, 1989 and PTO lodging date to May 15, 1989.

HON. Helen J. Frye, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

ORDER

FRYE, Judge:

It is HEREBY ORDERED that the defendant's motion to dismiss is Granted.

DATED this ___ day of September, 1988.

_____
Helen J. Frye
United States District Judge

Civil No. 87-952-FR

OPINION

FRYE, Judge:

The matter before the court is the United States of America's motion to Dismiss the Plaintiff's Complaint. Plaintiff Gordon E. Powelson (Powelson) is the Personal Representative of the Estate of Clydena M. Gross, Deceased (the Estate). Powelson commenced this action seeking a declaration that the government has proceeded improperly to assess and collect unpaid federal estate taxes. In a prior opinion dated November 23, 1987 this court detailed the facts leading up to the filing of the complaint as follows:

> that on August 17, 1981, the United States made a tax assessment against the Estate and determined that an estate tax was owing in the amount of $147,492.24;
>
> that on June 12, 1987, the United States issued to the Estate a Notice of Estate Tax Due and by that notice demanded immediate payment in the amount of $288,925.37 which included interest through June 22, 1987;
>
> that on July 1, 1987, the United States issued to the Estate a Statement of Levy (IRS Form 668-B);
>
> that on July 1, 1987, the United States issued to the Estate a Notice of Seizure of Real Property (IRS Form 2433) in the County of Multnomah, State of Oregon and that the Notice of Seizure indicated past estate taxes due in the amount of $290,168.09.

Since the opinion of November 23, 1987 the following facts have occurred:

1. On February 5, 1988, the United States issued to the Estate a Notice of Intention to Levy (IRS Form 1058) in the amount of $306,337.60.

2. On February 16, 1988, the United States issued to the Estate a Statement of Levy (IRS Form 668-B). This levy states that an assessment was made in the amount of $147,492.24.

3. On February 16, 1988, the United States issued to the Estate a Notice of Seizure (IRS Form 2433) of real property in Multnomah County, State of Oregon. This second Notice of Seizure showed past estate taxes due in the amount of $306,421.72.

4. On February 29, 1988, the United States issued to the Estate a Release of Levy (IRS Form 24330). This Release of Levy negated the levy of July 1, 1987.

5. On March 9, 1988, the United States issued to the Estate a Seizure and Sale Worksheet (IRS Form 4585) showing a tax liability in the amount of $311,825.95.

6. On March 18, 1988, the United States issued to the Estate a Notice of Sealed Bid Sale (IRS Form 2434-A) to be held

April 21, 1988.

7. This court granted leave to the United States to file an amended complaint April 18, 1988.

8. On April 21, 1988, the United States held the sealed bid sale as announced.

9. The Estate filed its amended complaint within 10 days of leave to file such being granted.

The amended complaint prays for relief as follows:

> [P]laintiff demands judgment declaring against defendant that the first levy and the accompanying notice of seizure are each null, void, invalid and extinguished because of the failure by defendant to give the notice required under 26 U.S.C. Sec. 6331 prior to seizure, and void because of the release of the first levy. Plaintiff further demands judgment declaring that the second levy and seizure are invalid and unenforceable because the defendant failed to assert the levy in the time allowed under statute. Plaintiff further demands that this Court issue a Temporary Restraining Order and Preliminary Injunction to restrain defendant from levying on the assets of the estate of Clydena M. Gross or selling the real property which has been distributed from the estate. Plaintiff further demands that because of the defendant's bad faith in defending this action, and pursuant to FRC 11, that plaintiff be awarded attorney fees and costs of this litigation.

Amended Complaint at 7-8.

In the matter before the court the Estate moves the court to dismiss this action on the grounds that claims raised as to the first levy are moot and that claims raised as to the second levy should be dismissed for lack of jurisdiction.

First Levy

The Statement of Levy, dated July 1, 1987, was negated pursuant to the Release of Levy dated February 29, 1988. No controversy remains with regard to whether the Statement of Levy dated July 1, 1987 is valid. It is not. This issue will not be addressed further.

Second Levy

The Estate asserts that the Statement of Levy issued on February 16, 1988 should be declared invalid on the grounds that it was not asserted within the time allowed under statute and that it was made in bad faith. The government argues that the Estate has an adequate legal remedy to contest the legality of the collection actions of the United States by seeking a refund under Section 7422 of the Internal Revenue Code.

ANALYSIS AND RULING

The taxes in this case have been collected in full. The

parties agree that there is no case and controversy regarding a restraining order or injunctive relief. There is no controversy as to the legality of the first levy. As such, the Estate's claim falls squarely within the provisions of Section 7422. Therefore this action will be dismissed as to the claim that the second levy was illegal.

DATED this ____ day of September, 1988.

_____

Helen J. Frye
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

and

GORDON E. POWELSON, as Distributee of the ESTATE OF CLYDENA M. GROSS, Deceased,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

AMENDED COMPLAINT

Plaintiff alleges:

JURISDICTION

1. Plaintiff GORDON E. POWELSON is Personal Representative for and Distributee of the Estate of Clydena M. Gross, deceased, and is a citizen of the State of Oregon.

2. Defendant United States of America was and is a public body acting by and through its Secretary o the Treasury and

its Internal Revenue Service ("IRS"). In all matter alleged, defendant acted by and through its IRS.

3. This action arises under 26 U.S.C. Sec. 6201, 6203, 6212, 6303, 6331 and 6502.

4. Jurisdiction is invoked under 28 U.S.C. Sec. 1340 and under the Declaratory Judgment Act, 28 U.S.C. Sec. 2201(a) and 2410.

GENERAL FACTUAL ALLEGATIONS

5. On January 20, 1982, effective July 29, 1980, there was a partial distribution of the assets of the Estate of Clydena M. Gross, sufficient to pay the estate taxes.

6. On June 12, 1987, defendant issued to plaintiff a Notice of Estate Tax due on the Estate of Clydena M. Gross. By that June 12, 1987 notice defendant demanded immediate payment in the amount of $288,925.37, which included interest through June 22, 1987. A true copy of that Notice and Demand is attached and incorporated as Exhibit 1.

7. On July 1, 1987, defendant issue to plaintiff a Statement of Levy (IRS Form 668-B) (hereinafter "the first levy"). The statement of Levy states that an assessment was made on

August 17, 1981 in the amount of $147,492.24. A true copy of that Statement of Levy is attached and incorporated as Exhibit 2.

8. On July 1, 1987, defendant issued to plaintiff a Notice of Seizure (IRS Form 2433) of real property in Multnomah County, State o Oregon. That July 1, 1987 Notice of Seizure showed past estate taxes due in the amount of $290,268.09. A true copy of that July 1, 1987 Notice of Seizure is attached and incorporated as Exhibit 3.

9. Defendant failed to give plaintiff any Notice of Intent to Levy as required under 26 U.S.C. Sec. 6331 prior to the seizure referred to in paragraph 8, above.

10. Defendant did not make or communicate to plaintiff, in any capacity, any finding that collection of the August 17, 1981 assessed estate tax that is indicated o the July 1, 1987 Statement of Levy was in jeopardy.

11. Failure by defendant to give to plaintiff, in any capacity, the requisite statutory Notice of Intent to Levy renders the purported Exhibit 2 levy null, void and invalid. The Exhibit 2 Statement of Levy and the Exhibit 3 Notice of Seizure are clouds upon the title of the real property described in the Exhibit 3

Notice of Seizure.

12. On February 5, 1988, defendant issued to plaintiff a Notice of Intention to Levy (IRS Form 1058). This Notice of Intention to Levy showed an amount owed of $306,337.60. A true copy of the Notice of Intention to Levy is attached and incorporated as Exhibit 4.

13. On February 16, 1988, defendant issued to plaintiff a Statement of Levy (IRS Form 668-B) (hereinafter "the second levy"). This second Statement of Levy states that an assessment was made on August 17, 1981 in the amount of $147,492.24. A true copy of this second Statement of Levy is attached and incorporated as Exhibit 5.

14. On February 16, 1988, defendant issued to plaintiff a Notice of Seizure (IRS Form 2433) or real property in Multnomah County, State of Oregon. This second Notice of Seizure showed past due estate taxes in the amount of $306,421.72. A true copy of this second Notice of Seizure is attached and incorporated as Exhibit 6.

15. On February 29, 1988, defendant issued to plaintiff a Release of Levy (IRS Form 2433). This release of levy releases

the first levy of July 1, 1987 (Exhibit 2). A true copy of the Release of Levy is attached and incorporated as Exhibit 7.

16. On March 9, 1988, defendant issued to plaintiff a Seizure and Sale Worksheet (IRS Form 4585) showing a tax liability in the amount of $311,825.95. A true copy of the Seizure and Sale Worksheet is attached and incorporated as Exhibit 8.

17. On March 18, 1988, defendant issued to plaintiff a Notice of Sealed Bid Sale (IRS Form 2434-A) to be held April 21, 1988. A true copy of the Notice of Sealed Bid Sale is attached and incorporated as Exhibit 9.

18. Plaintiff is entitled to an adjudication of the nullity, voidness, nd invalidity o the Statements of Levy and of the Notices of Seizure.

19. Plaintiff filed a United States Estate Tax Return with the Internal Revenue Service on or about June 29, 1981 with an estimated tax of $120,521.00. On July 1, 1987, defendant served plaintiff with a Levy that states that taxes were assessed on August 17, 1981 for the amount of $47,492.24. Defendant failed to serve notice of the August 17, 1981 Assessment on plaintiff pursuant to 26 U.S.C. Sec. 6201 and 6203.

20. The amount stated on the Levy as having been assessed on August 17, 1981 is greater than the amount of estimated tax on Plaintiff's Estate Tax Return. Defendant filed to give plaintiff any Notice of Deficiency pursuant to 26 U.S.C. Sec 6212.

21. Defendant's Answer in the within action alleges that plaintiff was served a Notice of Intent to Levy on October 19, 1981 and on July 5, 1982, and that therefore the July 1, 1987 levy is a valid levy.

22. Defendant could not have served the October 19, 1981 Notice of Intent to Levy or the July 5, 1982 Notice of Intent to Levy pursuant to statute, because the statute that required that notice did not become effective until after December 31, 1982. Because defendant could not have served the Notice of Intent to Levy (on the first levy) when defendant alleges to have served it, defendant cannot ultimately prevail in this action.

23. 26 U.S.C. Sec. 6502(a) provides a six year statute of limitations for levying upon property after assessment. The second levy was asserted more than six years from the date defendant claims to have made an assessment, and more than six years after

the effective date of the release of the property from probate.

24. A finding by this court that the first levy is invalid will mean that the defendant is attempting to levy after the expiration of the time permitted under the statute of limitations for collection and assessment. Plaintiff will lose property to which he is entitled and intends to sell, and will thereby be irreparably harmed.

25. By reason of the inadequacy of any legal remedy, and by reason of the fact that defendant threatens to levy on the assets of the Estate of Clydena M. Goss, plaintiff is compelled to ask this Court of a Temporary Restraining Order and a Preliminary Injunction.

26. Defendant, by filing an Answer to plaintiff's Complaint that alleges that two Notices of Intent to Levy were served on plaintiff before the statute requiring that notice was enacted, has acted in bad faith. Because defendant signed and filed an Answer in bad faith, and pursuant to Rule 11 of the Federal Rules of Civil Procedure, plaintiff is therefore entitled to attorney fees and the costs of this litigation.

27. Defendant served another Notice of Intent to Levy

on February 5, 1988. Defendant thereby attempted to levy a second time while defending the first levy. Defendant has acted in bad faith by defending the first levy while serving Notice of Intent to Levy for the second time.

28. Defendant issued a Notice of Seizure and Statement of Levy on February 16, 988, after a seizure and levy had already been issued.

29. The first levy has been released and so is unenforceable.

30. The second levy and seizure were issued after such a levy became unenforceable due to lapse of time under 26 U.S.C. Sec 6502(a).

31. Because there is not valid timely levy, defendant can not ultimately prevail in this action.

32. Without a valid and enforceable levy, any sale by defendant of the subject property would be a taking of property without due process in violation of U.S. Const. amend V.

WHEREFORE, plaintiff demands judgment declaring against defendant that the first levy and the accompanying notice of seizure are each null, void, invalid and extinguished because of

the failure by defendant to give the notice required under 26 U.S.C. Sec. 6331 prior to seizure,and void because of the release of the first levy. Plaintiff further demands judgment declaring that the second levy and seizure are invalid and unenforceable because the defendant failed to assert the levy in the time allowed under statute. Plaintiff further demands that this Court issue a Temporary Restraining Order and Preliminary Injunction to restrain defendant from levying on the assets of the estate of Clydena M. Gross or selling the real property which has been distributed from the estate. Plaintiff further demands that because of defendant's bad faith in defending this action, and pursuant to FRCP 11, that plaintiff be awarded attorney fees and costs of this litigation.

_____

Roy B. Thompson
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

CIVIL MINUTES - GENERAL

Date 4/18/88

Title Powelson v. USA

DOCKET ENTRY

Record of hrg on pltf's motion to amed complt, motion for TRO & prel.inj; etc. Motions taken under advisement.

****

Ruling made in afternoon of 4/18/88:

ORDER that pltf's motion to file amended complt is granted. A/Complt should be filed w/in 10 days.

ORDER denying pltf's motion for TRO and motion for

prel. injunction is denied on the grounds that no irreparable injury has been demonstrated by the pltf.

ORDER that deft's motion to consolidate hrg on prel. injunction & trial on the merits is moot.

PRESENT:

HON. Helen J. Frye, Judge

FOR PLAINTIFFS:	FOR DEFENDANTS:
Roy B. Thompson	Mark Nebergall

ORDER setting deft's motion to dismiss on Judge Frye's M/C 5/16/88, not for oral argument.

ORDER denying pltf's motion to compel w/leave to renew once counsel have confer re issues in dispute.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

ORDER

IT IS HEREBY ORDERED that defendant's motion to dismiss is DENIED.

DATED this 23 day of November, 1987.

Helen J. Frye
United State District Judge

OPINION

In the matter before the court, defendant, United States of America, moves the court pursuant to Fed. R. Civ. P. 12(b) (1) for an order dismissing plaintiff, Gordon E. Powelson's, complaint for lack of subject matter jurisdiction.

BACKGROUND

Plaintiff is the Personal Representative of the Estate of Clydena M. Gross, Deceased (the Estate). The Estate's complaint alleges in general:

that on August 17, 1981, the United States made a tax assessment against the Estate and determined that an estate tax was owing in the amount of $147,492.24;

that on July 12, 1987, the United State issued to the Estate a Notice of Estate Tax Due and by that notice demanded immediate payment in the amount of $288,925.37 which included interest through June 22, 1987;

that on July 1, 1987, the United State issued to the Estate a Statement of Levy (IRS form 668-B);

that on July 1, 1987, the United States issued to the Estate a Notice of Seizure of Real Property (IRS Form 2433) in the

County of Multnomah, State of Oregon and that the Notice of Seizure indicated past estate taxes due in the amount of $290,168.09.

The Estate asks this court to decree that the seizure of the real property, pursuant to the Statement of Levy of July 1, 1987, is null, void, invalid and extinguished because of the failure of the United State to give notice as required by 26 U.S.C. § 6331 prior to seizure.

The Estate invokes the jurisdiction of this court under 28 U.S.C. § 1340 and under the Declaratory Judgement Act, 28 U.S.C. § 2201(a). The Estate challenges only the procedural validity of the tax levy and not the merits of the alleged tax liability.

The United States moves to dismiss the complaint on the ground that the court lacks subject matter jurisdiction to grant the type of relief the Estate has requested. The United States asserts that 28 U.S.C. § 2201(a) prohibits the Estate's claim and therefore this court has no jurisdiction to proceed. 28 U.S.C. § 2201 (a) provides:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue

> Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United State, upon the filing of an appropriate pleading, may declare the right ... of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgement or decree and shall be reviewable as such. (Emphasis added).

The United State explains the purpose of section 2201 (a) is to insulate the determination, assessment, and collection of taxes from judicial interference prior to the enforcement of taxes and to prevent the use if section 2201 (a) to circumvent the prescribed statutory methods of reviewing administrative determinations relating to taxes. In sum, the United States argues that Congress has specifically prohibited the federal courts from awarding the type of relief that the Estate requests in this case.

The Estate asserts that section 2201(a) does not bar the relief that it seeks in this court. The Estate relies upon Rodriguez v. United States, 629 F.Supp. 333 (N.D. Ill. 1986), in which a taxpayer sought to have a levy declared void under identical statute and provision alleged in the Estate's complaint. The court in Rodriguez said:

> The IRS also maintains that this court cannot

declare the levy void because the Declaratory Judgement Act, 28 U.S.C. § 2201(a), does not apply to cases "with respect to federal taxes." Again, however, that prohibition does not apply to this procedural challenge. This provision of the Declaratory Judgement Act is generally interpreted as coextensive with the Anti-Injunction Act. If §7421 permits relief, §2201 will not ba it. Perlow v. Sassi, 711 F.2d 910, 911 (9th Cir.1983). See also Bob Jones, 416 U.S. at 732-733 n. 7, 94 S.Ct. at 2044 n.7 and Commissioner v. "American United" Inc., 416 U.S. 752, 759 n. 10, (both discussing question); Bullock v. Latham, 306 F.2d 45 (2d Cir. 1962). The Declaratory Judgement Act is intended, in tandem with §7421, to prevent disputes over the right to tax or the merits of an assessment from being heard in the district court unless the tax has first been paid. Church of Scientology of Celebrity Center v. Egger, 539 F.Supp. 491, 494 (D.D.C. 1982). Suits which do not thwart those goals are permissible under both Acts.

This action is therefore permissible as a suit to quiet title or as a § 6213 (a) suite for an injunction. The quiet title action, 26 U.S.C. §2410, is itself a declaratory judgement action. Unless no matters relating to tax liens are ever to be heard in a §2410 suit, then § 2410 cannot be within the intent of the prohibition on the tax disputes in §2201. Aqua, 539 F.2d at 940; Roberts, 436 F.Supp. at 561. A determination of the validity of the levy is also a necessary stepin the process leading to the injunctive relief authorized in § 6213(a), whether characterized as a declaratory judgment or not. Perlowin, 711 F.2d at 911, expressly held that the Declaratory Judgment Act was no barrier to a suit grounded on § 6213(a), nor was it an issue to the Supreme Court hearing the § 6213(a) suit in Laing, 423 U.S. 161 96 S.Ct. 473, 46 L.Ed.2d 416. See Laing, 364 F.Supp. at 470 (taxpayer also sought declaratory judgment). In short, the Declaratory Judgment Act would be a barrier to plaintiffs' suit only if it were given a construction inconsistent with the rest of the statutory scheme. This court does not so construe it.

This court, therefore, has jurisdiction and can grant relief. 629 F.Supp at 341.

The Estate argues that just as in Rodriguez, the IRS has seized real property, and this suit should be viewed as an action for quiet title under 26 U.S.C. § 2410 or as a suit to determine the validity of the levy.

ANALYSIS AND RULING

28 U.S.C. § 1340 grants jurisdiction to this court over "any civil action arising under any Act of Congress providing for internal revenue." An action which seeks a determination as to the validity of an IRS levy arises under the statutes that govern assessment and levy.

The United States contends, however, that this action is barred by the Declaratory Judgment Act, 28 U.S.C. § 2201(a), which provides that the court may declare the rights of any interested party "except with respect to Federal taxes." In order to determine whether section 2201(a) bars this action, the court must determine whether this action would be allowed under the Anti-Injunction Act, 26 U.S.C. § 7421(a), because a suit which is allowed under the Anti-Injunction Act is not barred by the

Declaratory Judgment Act. Perlowin v. Sassi, 711 F.2d 910, 911 (9th Cir. 1983).

> The Anti-Injunction Act, 26 U.S.C. § 7421(a), provides:
>
> Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

By the language of section 6213(a), the Anti-Injunction Act does not apply to a taxpayer's suit to enjoin a levy imposed either before notice of deficiency, during the ninety-day period after that notice, or while a petition is pending in the tax court. While the Estate's claim in this case arises under section 6331, the Supreme Court has included the notice and demand procedures of section 6331 in suits permitted under the exception provided in section 6213(a). In Commissioner v. Shapiro, 424 U.S. 614 (1976), the court stated:

> Normally, the Internal Revenue Service may not "assess" a tax or collect it, by levying on or otherwise

seizing a taxpayer's assets, until the taxpayer has had an opportunity to exhaust his administrative remedies, which include an opportunity to litigate his tax liability fully in the Tax Court, 26 U.S.C. §§ 6212, 6213; and if the Internal Revenue Service does attempt to collect the tax by levy or otherwise, before such exhaustion of remedies in violation of § 6213, the collection is not protected by the Anti-Injunction Act and may be restrained by a United States district court at the instance of the taxpayer. §§ 6213(a), 7421(a). The rule is otherwise when the Commissioner proceeds under § 6861 and finds that collection of a tax due and owing from a taxpayer will be "jeopardized by delay" in collection. In such a case, the Commissioner may immediately assess the tax and, upon "notice and demand . . . for payment thereof" followed by the taxpayer's "failure or refusal to pay such tax," may immediately levy on the taxpayer's assets. §§ 6861, 6331. When the Commissioner follows this procedure,the Anti-Injunction Act applies in full force and "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in

any court by an person." § 7421(a). (Footnotes omitted). 424 U.S. at 616-19. See Rodriguez v. United States, 629 F.Supp. at 340, and L.O.C. Industries, Inc. v. United states, 423 F.Supp. 265, 272-73 (M.. Tenn. 1976) (the district courts in both of these cases, citing the above passage in Shapiro, ruled that the requirements of section 6331 must be met to apply the bar of the Anti-Injunction Act).

This court concludes that the Estate's action here arises directly under section 6331 and fits within the statutory exception under section 6213(a) to the Anti-Injunction Act. Since the action is allowed under the Anti-Injunction Act, it is not barred by the Declaratory Judgment Act.

The United States' motion to dismiss is denied.

DATED this 23rd day of November, 1987.

Helen J. Frye
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, as Personal Representative of the Estate of CLYDENA M. GROSS, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 87-952-FR

COMPLAINT FOR DECLARATORY JUDGMENT

JURISDICTION

1. Plaintiff GORDON E. POWELSON is Personal Representative of the Estate of Clydena M. Gross, deceased, and is a citizen of the State of Oregon.

2. Defendant United States of America was and is public body acting by and through its Secretary of the Treasury and its Internal Revenue Service ("IRS"). In all matters alleged, defendant acted by and through its IRS.

3. This action arises under 26 USC §6331.

4. Jurisdiction is invoked under 28 USC §1340 and

under the Declaratory Judgment Act, 28 USC §2201(a).

GENERAL FACTUAL ALLEGATIONS

5. On August 17, 1981, defendant made a tax assessment against the Estate of Clydena M. Gross and determined that an estate tax was owing in the amount of $147,492.24.

6. On June 12, 1987, defendant issued to plaintiff a Notice of Estate Tax due on the Estate of Clydena M. Gross. By that June 12, 1987 notice, defendant demanded immediate payment in the amount of $288,925.37, which included interest through June 22, 1987. A true copy of that Notice and Demand is attached and incorporated as Exhibit 1.

7. On July 1, 1987, defendant issued to plaintiff a Statement of Levy (IRS Form 668-B). A true copy of that Statement of Levy is attached and incorporated as Exhibit 2.

8. On July 1, 1987, defendant issued to plaintiff a Notice of Seizure (IRS Form 2433) of real property in Multnomah County, State of Oregon. That July 1, 1987 Notice of Seizure showed past estate taxes due in the amount of $290,168.09., A true copy of that July 1, 1987 Notice of Seizure is attached and

incorporated as Exhibit 3.

9. Defendant failed to give plaintiff any Notice of Intent to Levy as required under 26 USC §6331 prior to defendant's Exhibit 3 seizure.

10. Defendant did not make or communicate to plaintiff any finding that collection of the August 17, 1981 assessed estate tax was in jeopardy.

11. Failure by defendant to give to plaintiff the requisite statutory Notice of Intent to Levy renders the purported Exhibit 2 levy null, void, and invalid. The Exhibit 2 Statement of Levy and the Exhibit 3 Notice of Seizure are clouds upon the title of the real property described in the Exhibit 3 Notice of Seizure.

12. Plaintiff is entitled to an adjudication of the nullity, voidness and invalidity of the Statement of Levy and of the Notice of Seizure.

WHEREFORE, plaintiff demands judgment declaring against defendant that the levy and the notice of seizure are each null, void, invalid and extinguished because of the failure by defendant to give the notice required under 26 USC §6331 prior

to seizure.

BOLLIGER, HAMPTON & TARLOW

_____

LEWIS B. HAMPTON, OSB #60032
ROY B. THOMPSON, OSB #82501

TRIAL ATTORNEY: LEWIS B. HAMPTON, OSB #60032

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, an individual, and CHICAGO TITLE INSURANCE COMPANY OF OREGON, an Oregon corporation,

Plaintiffs,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 89-512-FR

OPINION

FRYE, Judge:

The matter before the court is plaintiffs' motion for reconsideration and for leave to file a second amended complaint (#31).

On October 13, 1989, this court issued an opinion in which the court found that there was no basis for extending the waiver of immunity from suit to third parties such as Gordon Powelson and Chicago Title Insurance Company of Oregon (Chicago Title).

On October 13, 1989, the court entered a judgment and

order granting the government's motion to dismiss this action. Powelson and Chicago Title now ask for reconsideration and leave of the court to file an amended complaint on the grounds that Powelson is not a third party, but is in fact the "taxpayer" liable for the unpaid estate taxes as the distributee of the estate.

Judgment in this action was entered on October 13, 1989. This court has no further jurisdiction to grant leave to amend, nor would the court be so inclined if judgment had not been entered. The merits of the taxpayer's claim that the collection of the estate taxes was illegal have been fully litigated and determined by this court in Powelson v. United States, Civil No. 87-952-FR. See Opinion dated September 21, 1989.

Plaintiffs' motion for reconsideration and leave to file a second amended complaint (#31) is denied.

DATED 21 day of November, 1989.

HELEN J. FRYE
United States District Judge

Civil No. 89-512-FR

ORDER

IT IS HEREBY ORDERED that plaintiffs' motion for reconsideration and leave to file a second amended complaint (#31) is DENIED.

DATED this 21 day of November, 1989.

HELEN J. FRYE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, an individual, and CHICAGO TITLE INSURANCE COMPANY OF OREGON, an Oregon corporation,

Plaintiffs,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 89-512-FR

AMENDED COMPLAINT
Declaratory Judgment and Quiet Title

A. Parties

1.

Plaintiff Gordon E. Powelson (hereinafter Powelson) is an individual residing in the State of Oregon.

2.

Plaintiff Chicago Title Insurance Company of Oregon (hereinafter Chicago Title) is an active Oregon corporateion and authorized to do business in the state of Oregon.

3.

Defendant United States of America was and is a public body acting by and through its Secretary of the Treasury and its Internal Revenue Service (IRS). In all matters alleged, defendant acted by and through its IRS.

B. Jurisdiction

4.

Jurisdiction is invoked under 28 USC Sections 1340, 1346, and 2201.

C. Nature of Action

5.

This is an action for a declaration that the procedures used in the collection of the tax owed by the Estate of Clydena M. Gross were invalid and unlawful. The real property of the plaintiff Powelson herein was seized and sold after the applicable statute of limitations had expired, under a levy which was invalid due to failure to give proper notices, without giving Notice of Sale under the procedures set out by law, and under a Notice of Sale which was on its face defective. Plaintiffs are not raising a challenge to the amount or validity of the tax asserted

against the Estate of Clydena M. Gross, but only to the procedures used by defendant in attempting to collect that tax.

COUNT ONE

FAILURE TO GIVE STATUTORY NOTICE OF INTENTION TO LEVY

6.

Plaintiffs reallege and incorporate paragraphs 1 through 5 above.

7.

Clydena M. Gross died testate July 29, 1980. Under the will, plaintiff Powelson was the major distributee. A copy of the will is attached as Exhibit 1. On January 20, 1982 nunc pro tunc July 29, 1980, there was a partial distribution to plaintiff Powelson of an asset of the estate located at 5105 SE 82nd Avenue, Portland, Multnomah County, Oregon, known as the Organ Grinder Restaurant ("Organ Grinder"). The Organ Grinder is the property which is the subject of this action. A copy of the Order of Partial Distribution is attached as Exhibit 2.

8.

Defendant sold the Organ Grider at a Sealed Bid

Sale April 21, 1998, at the IRS collection office in Oregon City, Clackamas County, Oregon. Plaintiff Chicago Title was the purchaser at that sale, for a purchaser at that sale, for a purchase price of $400,000.

9.

On July 1, 1987, defendant issued to plaintiff Powelson Notices of Levy and Seizure of the Organ Grinder, in order to satisfy the estate tax owed by the Estate of Clydena M. Gross ("the first levy and seizure"). Copies are attached as Exhibits 3 and 4.

10.

The effective date of distribution of the Organ Grinder from the Estate was July 29, 1980.

11.

Defendant asserts in the notices of levy and seizure that an assessment of estate tax owed by the Estate of Clydena M. Gross was made August 17, 1981, in the amount of $147,492.24.

12.

No Notice of Intention to Levy was issued to plaintiff Powelson prior to the first levy and seizure. Such notice

is required by 26 USC Section 6331.

13.

Failure by defendant to give plaintiff Powelson the required statutory Notice of Intention to Levy renders the first levy and seizure invalid.

14.

Plaintiffs are entitled to a declaration by this Court that the first levy and seizure of the Organ Grinder were invalid due to failure of defendant to give the statutorily required Notice of Intention to Levy, and any sale thereunder must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title.

15.

Plaintiffs are further entitled to a declaration of this Court that defendant's action in asserting the first levy without following its own procedures constitutes an unreasonable position on the part of defendant entitling plaintiffs to reasonable attorney's fees from defendant.

COUNT TWO

DUAL LEVIES

16.

Plaintiffs reallege and reincorporate paragraphs 6 through 8 above.

17.

On February 16, 1988, while defending the first levy, defendant issued to plaintiff Powelson Notices of Levy and Seizure ("the second levy and seizure") in order to satisfy the estate tax owed by the Estate of Clydena M. Gross. Copies are attached as Exhibits 5 and 6. The property had already been seized by defendant; one can not seize property one already holds. The assertion of the second levy while defending the first levy is an inconsistent and unreasonable position on the part of defendant.

18.

Plaintiffs are entitled to a declaration of this Court that the second levy and seizure were invalid in that the property had already been seized by defendant, and any sale thereunder must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title.

19.

Plaintiffs are further entitled to a declaration of this Court that the defense of the second levy while the first levy was in place was an inconsistent and unreasonable position on the part of defendant entitling plaintiffs to reasonable attorney's fees from defendant.

COUNT THREE

STATUE OF LIMITATIONS

(Second Levy)

20.

Plaintiffs reallege and reincorporate paragraphs 6 through 8 and 17 above.

21.

The Internal Revenue Code provides that a valid collection of taxes must occur within six years and six months of the date the estate property is distributed from probate or six years from the date of assessment. If collection is not made in a timely manner it is barred.

22.

The second levy and seizure occurred more than six

years and six months after the effective date of distribution of the property from probate, and more than six years from the date of assessment.

23.

Plaintiffs are entitled to a declaration of this Court that the second levy and seizure were invalid because they were barred by the statute of limitations, and any sale thereunder must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title.

24.

Plaintiffs are further entitled to a declaration of this Court that because the statute of limitations has now clearly expired, no valid levy could now be issued.

COUNT FOUR

FAILURE TO GIVE STATUTORY NOTICE OF INTENTION TO LEVY

(Second Levy)

25.

Plaintiffs reallege and reincorporate paragraph 20 above.

26.

No Notice of Intention to Levy was issued to plaintiff Powelson prior to the second levy and seizure as required by 26 USC Section 6331. Failure by defendant to give plaintiff Powelson the statutorily required notice renders the second levy and seizure invalid.

27.

Plaintiffs are entitled to a declaration of this Court that the second levy and seizure were invalid because of defendant's failure to give to plaintiff Powelson the statutorily required Notice of Intention to Levy, and any sale thereunder must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title.

COUNT FIVE

DEFECTIVE DELIVERY OF NOTICE OF SALE

28.

PlaintiffS reallege and reincorporate paragraphs 6 through 8 above.

29.

On March 24, 1988, defendant's agent, James A.

Bagby, of the IRS collection office in Oregon City, Oregon, mailed a Notice of Sealed Bid Sale to plaintiff. The Notice of Sealed Bid Sale is attached and incorporated as Exhibit 7. See also the excerpt of the deposition of James A. Bagby taken February 16, 1989, (Exhibit 8), and the excerpt from Mr. Bagby's field notes (Exhibit 9).

30.

26 USC Section 6335(b) requires that the Notice of Sale be delivered to the owner of the property by the Secretary of the Treasury (or his delegate).

31.

Employees of the United States Postal Service are not members of the Department of the Treasury.

32.

Due to the failure of defendant to deliver the Notice of Sale by the statutorily prescribed means, the sale was void ab initio.

33.

Plaintiff is entitled to a declaration from this Court that due to defendant's failure to deliver the prescribed notice in

the statutorily prescribed manner, the sale was void and must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title.

COUNT SIX

DEFECTIVE NOTICE OF SALE

34.

Plaintiffs reallege and reincorporate paragraph 28 above.

35.

Treas. Reg. Section 301.6335-1 requires that the Notice of Sale offer for sale all of the right, title and interest of the taxpayer to the subject property. The taxpayer in this matter is the Estate of Clydena M. Gross.

36.

The Notice of Sale was defective in that it offered for sale all of the right, title and interest of the plaintiff Powelson in the subject property.

37.

Plaintiffs are entitled to a declaration of this Court that due to the Notice of Sale being defective on its face, the sale

of the Organ Grinder was defective and msut be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title.

COUNT SEVEN

IMPROPER LOCATION OF SALE

38.

Plaintiffs reallege and incorporate paragraphs 6 through 8 above.

39.

26 USC Section 6335(d) provides that the place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

40.

Treas. Reg. Section 301.6335-1(c)(1) provides that the place of sale shall be within the county in which the property is seized, except that if it appears to the district director under whose supervision the seizure was made that substantially higher bids may be obtained for the property if the sale is held at a place outside such county, he may order that the sale be held in such other place.

41.

The property was seized in Multnomah County Oregon; the sale was held in Clackamas County, Oregon.

42.

There was no special order of the Secretary that the sale be held in a county different from that in which the property was seized.

43.

There was no determination by the district director that substantially higher bids would be likely to be obtained in Clackamas County, rather than Multnomah County.

44.

Plaintiffs are entitled to a declaration of this Court that due to the sale being held in an improper county, the sale of the Organ Grinder was defective and must be set aside, the property returned to plaintiff Powelson and the purhase price returned to plaintiff Chicago title.

COUNT EIGHT

BREACH OF CONTRACT

FAILURE OF CONSIDERATION

46.

Plaintiffs reallege and incorporate paragraphs 6 through 8 above.

47.

Defendant offered and advertised the right title and interest in the property of plaintiff Powelson.

48.

Plaintiff Chicago Title accepted that offer for the sale of real property on April 21, 1988.

49.

Plaintiff Chicago Title has performed all conditions of its performance under the contract for sale, i.e., the payment to defendant of the sum of $400,000.

50.

The quitclaim deed tendered from defendant to plaintiff Chicago Title purports to transfer the right, title and interest in the subject property of the Estate of Clydena M. Gross.

51.

Due to the subject property having been released from probate and transferred to plaintiff Powelson, the Estate of

Clydena M. Gross had no interest in the property which could be transferred.

52.

Plaintiff Chicago Title is entitled to a declaration o this Court that due to the deed to the property being defective, that there was no consideration for the purchase price paid and that the purchase price msut be returned to plaintiff Chicago Title.

SECOND CLAIM FOR RELIEF

QUIET TITLE

53.

Plaintiffs reallege and reincorporate paragraphs 1 through 3, 7 through 15, 17, 18, 21 through 24, 26, 27, 29 through 33, 35 through 37, 39 through 45 and 50 through 52 above.

54.

Jurisdiction is invoked under 28 USC Sections 2409a and 2410(a).

55.

This is an action to quiet title in plaintiff Powelson to real property improperly seized and sold to pay estate taxes allegedly owed by another party. The other party (the taxpayer)

is the Estate of Clydena M. Gross. The decedent's social security number was 539-01-0464, she lived at 9765 SE Regal Drive, Portland, Oregon. The plaintiff/distributee of the estate currently resides at 6155 SW Seymour Street, Portland, Oregon.

56.

Plaintiff Powelson is the owner in fee of that real property located at 5015 SE 82nd Avenue, Portland, Oregon, known as the Organ Grinder Restaurant. A copy of the legal description of the property is attached as Exhibit 10.

57.

Defendant has claimed an interest in or lien upn the Orgaon Grinder adverse to the plaintiff, by and through estate tax alleged to be owed by the Estate of Clydena M. Gross.

58.

The purchaser of the Organ Grinder at the tax sale has been added as a party plaintiff.

59.

The interest or lien asserted by defendant is invalid for the reasons set forth in the paragraphs realleged and reincorporated above.

60.

Such interest or lien asserted by defendant constitutes a cloud upon plaintiff Powelson's title to the Organ Grinder.

61.

Plaintiffs are entitled to an Order of this Court quieting title to the Organ Grinder in plaintiff Powelson and that a deed be issued to plaintiff Powelson and the purchase price be returned to plaintiff Chicago Title.

WHEREFORE, plaintiffs pray for judgment as follows:

1. On the First Claim for Relief for Declarations of this Court that:

(a) The first levy and seizure of the Organ Grinder were invalid due to the failure of defendant to give plaintiff Powelson the statutorily required Notice of Intention to Levy, and any sale thereunder must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title, and that the defendant's failure to follow its own statutorily prescribed procedures constituted an

unreasonable posiiton on the part of defendant, entitling plaintiffs to reasonable attorney's fees from defendant;

(b) The second levy and seizure of the Organ Grinder were invalid in that the property had already been seized by defendant, and any sale thereunder must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title, and that the defense of the second levy while the first was in place constituted an unreasonable position on the part of defendant, entitling plaintiffs to reasonable attorney's fees from defendant;

(c) The second levy and seizure of the Organ Grinder occurred after the statute of limitations had run, and any sale thereunder must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title, and that because the statute of limitations has now expired no valid levy can now issue;

(d) The second levy and seizure of the Organ Grinder were invalid due to the failure of defendant to give plaintiff Powelson the statutorily required Notice of Intention to Levy, and any sale thereunder must be set aside, the property

returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title;

(e) Due to defendant's failure to deliver the prescribed Notice of Sale in the statutorily prescribed manner the sale was void and must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title;

(f) Due to the Notice of Sale being defective on its face, the sale of the Organ Grinder was defective and must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title;

(g) Due to the sale of the subject property being held in the wrong county, the sale of the Organ Grinder was defective and must be set aside, the property returned to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title;

(h) Due to the subject property having been transferred out of probate, Estate of Clydena M. Gross had no interest in the Organ Grinder which could be transferred by the quitclaim deed from defendant to Chicago Title, there was no

consideration for the purchase price, and the purchase price must be returned to plaintiff Chicago Title.

2. On the Second Claim for Relief for an Order of this Court quieting title to the Organ Grinder Restaurant in plaintiff, and the deed be issued to plaintiff Powelson and the purchase price returned to plaintiff Chicago Title.

3. For plaintiff's reasonable costs, expenditures and attorney's fees.

4. For such other relief as this Court may deem just and equitable.

_____

Roy B. Thompson, OSB # 82501
Attorney for Plaintiff

Sec. 6901. Transferred assets.

(a) **Method of collection.**

The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) **Income, estate, and gift taxes.**

(A) Transferees. The liability, at law or in equity of a transferee of property -

(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes),

(ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes), or

(iii) of a donor in the case of a tax imposed by chapter 12 (relating to gift taxes),

in respect of the tax imposed by subtitle A or B.

(B) Fiduciaries. The liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of the payment of any tax described in subparagraph (A) from the estate of the taxpayer, the decedent, or the donor, as the case may be.

(2) **Other taxes.** The liability, at law or in equity of a transferee of property of any person liable in respect of any tax imposed by this title (other than a tax imposed by subtitle A or B), but only if such liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a).

(b) **Liability.**

Any liability referred to in subsection (a) may be either as to the amount of tax shown on a return or as to any deficiency or underpayment of any tax.

(g) **Address for notice of liability.**

In the absence of notice of the Secretary under section 6903 of the existence of a fiduciary relationship, any notice of liability enforceable under this section required to be mailed to such person, shall, if mailed to the person subject to the liability at his last known address, be sufficient for purposes of this title, even if such person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(h) Definition of transferee.

As used in this section, the term "transferee" includes donee, heir, legatee, devisee, and distributee, and with respect to estate taxes, also includes any person who, under section 6324(a)(2), is personally liable for any part of such tax.

Sec. 7421 Prohibition of suits to restrain assessment or collection.

(a) **Tax.**

Except as provided in sections 6212(a) (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax was assessed.

(b) **Liability of transferee or fiduciary.**

No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of-

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of any such tax.

Sec. 7701. Definitions

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof-

(1) **Person.** The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(14) **Taxpayer.** The term "taxpayer" means any person subject to any internal revenue tax.

Sec. 6331. Levy and distraint.

(a) Authority of Secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.

The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(d) Requirement of notice before levy

(1) In general. Levy may be made under subsection (a) upon the salary or wages of other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) 30-day requirement. The notice required under paragraph (1) shall be-

(A) given in person,
(B) left at the dwelling or usual place of business of such person, or
(C) sent by certified or registered mail to such person's last known address, no less than 30 days before the day of the levy.

In '88, P.L. 100-647, Sec. 6236(a)(1), substituted "30 days" for "10 days" in para. (d)(2)...Sec. 6236(a)(2), substituted "30-day" for "10-day" in heading of para. (d)(2)...Sec. 6236(a)(3), added para. (d)(4)...Sec. 6236(b)(1), amended subsec. (e)...Sec. 6236(b)(2), added para. (f)(3)...Sec. 6235(d), redesignated subsec. (f) as subsec. (h) and added new subsecs. (f) and (g), effective for levies issued on or after 7/1/89.

§ 1340. Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under and Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.
June 25, 1948, c. 646, 62 Stat. 932

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than action brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the right and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgement or decree and shall be reviewable as such.

§ 2410. Action affecting property on which the United States has a lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United State, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter-

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GORDON E. POWELSON, an individual, and CHICAGO TITLE INSURANCE COMPANY OF OREGON, an Oregon corporation,

Plaintiffs,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,

Defendant.

Civil No. 89-512-FR

OPINION

FRYE, Judge:

IN the matter before the court, defendant, United States of America, (the government), moves the court for an order dismissing this case pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that the court lacks subject matter jurisdiction over this action (#15).

FACTS AS PLEAD

This is an action byt plaintiffs for a declaration tht the procedures used in the collection of federal estate taxes owed by

the Estate f Clydena M. Gross are invalid and unlawful. Plaintiff Gordon E. Powelson was the major distributee of the Estate of Clydena M. Gross.

On August 17, 1981, the government made an assessment of federal estate taxes owed by the estate in the amount of $147,492.24. On January 20, 1982, there was a partial distribution to Powelson of an asset of the estte known as the Organ Grinder Restaurant. This property is the subject of this action. The order of distribution stated that Powelson took the property "subject to all taxes and liabilities which have accrued since July 29, 1980."

On July 1, 1987, the government issued to Powelson, as personal representative of the estate, Notices of Levy and Seizure of the Organ Grinder Restaurant in order to satisfy the federal estate taxes owed by the estate. On February 16, 1988, the government issued to Powelson a second Notice of Levy and Seizure of the Organ Grinder Restaurant in order to satisfy the federal estate taxes owed by the estate. On April 21, 1988, the government sold the Organ Grinder Restaurant at sealed bid sale to plaintiff Chicago Title Insurance Company of Oregon (Chicago Title) for the sum of $400,000.00.

Plaintiffs seek declaratory relief and quiet title.

CONTENTIONS OF THE PARTIES

The government contends that 1) this court lacks jurisdiction to enter a declaratory judgment; 2) plaintiffs may not bring this action as one for wrongful levy; 3) this action is barred by 28 U.S.C. § 2201; 4) the issue of whether the first levy is invalid is moot; and 5) the court lacks jurisdiction to entertain the quiet title claim. Plaintiffs assert that there may be some merit to the assertion that the issue of the first levy is moot, but aregues that the remaining claims [of the governement] are without merit.

ANALYSIS

1. Jurisdiction of the Court to Enter a Declaratory Judgment

The amended complaint states that "[j]urisdiciton is invoked under 28 USC Sections 1340, 1346, and 2201." (Amended Complaint, p. 2, para. 4). The government argues that the plaintiffs have alleged no statute which constitutes a waiver of the federal government's immunity from suits of this type and that, in fact, no waiver exists.

As the government points out, and plaintiffs do not contest, sections 1340 and 1346 provide original jurisdiction for certain

types of actions and are not a consent by the United States to suits against it. Plaintiffs rely upon the provisions of the eclaratory Judgment Act, 28 U.S.C § 2201, for a waiver of the governemnt's immunity from suit.

The Declaratory Judgment Act, 28 U.S.C. §2201(a), provides that the court may declare the rights of any interested party "except with respect to Federal taxes." However, the Ceclaratory Judgment Act is coextensive with the Anti-Injunction Act despite the broader language of the Declaratory Judgment Act. Perlowin v. Sassi, 711 F.2d 910, 911 (9th Cir. 1983).

The Anti-Injunction Act, 26 U.S.C. § 7421(a), provides:

> Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

In this case, the plaintiffs are Powelson, in his capacity as the major distributee of the estate, and Chicago Title, as purchaser of the Organ Grinder Restaurant. Powelson and Chicago Title are not raising a challenge to the amount or the validity of the tax asserted against the estate, but only to the procedures used by the

government in attempting to collect the tax. Powelson and Chicago Title assert that the government failed to give a Notice of Intent to Levy as required by section 6331 prior to the first levy, and that the second levy issued on February 16, 1988 was invalid. Powelson and Chicago Title also challenge the delivery of Notice f Sale as defective and assert that the sale was conducted in an improper location.

Congress has determined the procedure to which a taxpayer is entitled in the statutes governing the collection of an assessment. This court found in the case entitld Powelson v. United States, Civil No. 87-952-FR, that the taxpayer was entitled to maintain an action contesting the validity of the levies because the action arose directly under section 6331 and fit within the statutory exception under 6213(a) to the Anti-Injunction Act. The merits of the claims that the collection of the estate taxes was illegal have been fully litigated and determined by this court in that action. (Opinion, Sept. 21, 1989, Powelson v. United States, Civil No. 87-952-FR).

The court finds that in this case there is no basis for extending the waiver of immunity from suit to third parties such as Powelson and Chicago Title. The general rule has long been that

the waiver of sovereign immunity must be unmitakably clear in the language of the statute. Atascadero State Hosp. v. Scanlon 473 U.S. 234, 242 (1985). The procedural safeguards contained in section 6331 as to Notice of Levy and section 6335(b) as to Notice of Sale are reserved to the taxpayer. Any action that the taxpayer may have to enforce those procedures cannot be construed as a general waiver of the immunity from suit as to anyone who may derive some benefit from the taxpayer's position.

The court finds that this action does not fit within any statutory exception to the Anti-Injunction Act, and that the prohibition contained in the Declaratory Injunction Act, that the court may declare the rights of any interested party "except with respect to Federal taxes," precludes the court from exercising jurisdiction pursuant to 28 U.S.C. §2201. Plaintiffs' first claim for relief for declaratory judgement is dismissed.

2. Jurisdiction Over Quiet Title

In the second claim for relief, plaintiffs seek an order of this court quieting title to the Organ Grinder Restaurant in plaintiff Powelson and ordering that a deed be issued to plaintiff Chicago Title. Plaintiffs invoke jurisdiction of the court under 28

U.S.C. § 2410, which states in relevant part:

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter --
>
> (1) to quiet title to,
> (2) to foreclose a mortgage or other lien upon,
> (3) to partition,
> (4) to condemn, or
> (5) of interpleader or in the nature of interpleader with respect to
>
> real or personal property on which the United States has or claims a mortgage or other lien

The government maintains that section 2410 does not apply to waive the government's immunity from suit because plaintiffs do not and cannot allege that the government "has or claims a mortgage or other lien" upon the Organ Grinder Restaurant at this time. The estate tax lien which the government has upon the property continued only until the tax liability was satisfied. The allegation in the complaint are that the estate taxes have been paid in full. Therefore, the allegations fail to meet the requirements of section 2410 that the government claims a lien against the property.

Plaintiff Powelson argues that he should be entitled to maintain a quiet title action because he has no refund action as a taxpayer would have. Powelson argues that as an individual he had his property seized and sold illegally, and that equity should support this action because he has no adequate remedy at law.

Section 2410 confers a limited waiver of sovereign immunity. Plaintiffs' action does not fall within the provisions of section 2410 in that the government does not have or claim a mortgage or other lien against the subject property. Plaintiffs argument that they should be able to pursue this action because they do not have the remedies at law available to a taxpayer is not convincing. The right to enforce the legal collection of taxes is vested in the taxpayer and cannot be enforced by a third parties seeking to benefit from the taxpayers' fortunes. In this case, the taxpayer properly pursued the claims of illegal collection, and the plaintiffs in this action have no such rights. Any claim that the distributee had to the property that could have been determined in a quiet title action against the government had to have been brought while the government maintained a claim in the property. Since the plaintiffs have alleged no claim or interest in the

property vested in the government as of the time the complaint was filed, this quiet title action comes too late.

The second claim for relief for quiet title is dismissed.

CONCLUSION

The motion to dismiss (#15) of the government is granted, and judgement is entered for the government.

DATED this 12 day of October, 1989.

_____

HELEN J. FRYE
United States District Judge

Supreme Court, U.S.
FILED
MAR 26 1993
OFFICE OF THE CLERK

No. 92-1227

In the Supreme Court of the United States

OCTOBER TERM, 1992

GORDON E. POWELSON, AN INDIVIDUAL, AND CHICAGO TITLE INSURANCE COMPANY OF OREGON, AN OREGON CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

GORDON E. POWELSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF CLYDENA M. GROSS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

DAVID I. PINCUS
JOEL A. RABINOVITZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

1. Whether, in Ninth Circuit Case No. 89-35736, the court of appeals erred in not explicitly ruling on a quiet title claim when one petitioner (the Estate) did not seek such relief in its final amended complaint and the other petitioner (Powelson, in his individual capacity) failed to file a notice of appeal.

2. Whether, in Ninth Circuit Case No. 90-35005, the court of appeals (i) correctly rejected a request for declaratory relief because it was barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201, and (ii) correctly rejected a quiet title claim brought under 28 U.S.C. 2410 on the ground that the government had already sold the property when the suit was filed.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 979 F.2d 141. The opinions of the district court (Pet. App. B2-B18, V1-V9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1992. A petition for rehearing en banc was denied on December 8, 1992. The petition for a writ of certiorari was filed on January 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Estate of Clydena Gross filed an estate tax return but failed to pay the taxes reported to be due. On August 17, 1981, the Internal Revenue Service assessed the reported taxes, plus interest and penalties. At the time of the decedent's death, a federal lien to secure payment of the taxes owed by the Estate attached to all property belonging to the estate. See 26 U.S.C. 6324(a)(1).

The Organ Grinder restaurant, which was owned by the Estate, was thereafter distributed to petitioner Gordon Powelson (Gross's son) "subject to all taxes and liabilities" (Pet. App. B3-B4). On July 1, 1987, the Service levied upon the restaurant to collect the unpaid estate taxes. The Service sent Powelson, who was then in possession of the property, a Statement of Levy and Notice of Seizure (*id.* at B4).

On August 21, 1987, the Estate brought suit in federal district court (the First Suit). The Estate sought a declaratory judgment that the levy was void because the Service had failed to send the Estate a Notice of Intent to Levy (Pet. App. L1-L4). On February 5, 1988, the IRS sent the Estate a Notice of Intention to Levy and, on February 16, 1988, the IRS again levied on the property (*id.* at B5).

On March 23, 1988, two employees of the IRS went to Powelson's residence to serve him a Notice of Sale of the property. Unable to find him, they mailed him the notice by both regular and certified mail. Powelson received the notice on or about March 28, 1988. The Notice of Sale stated that the Organ Grinder restaurant had been seized for nonpayment of estate taxes, that the property would be sold under sealed bid, and that "[o]nly the right, title, and interest[] of the Estate of Clydena M. Gross, Gordon E. Powelson-Distributee" would be offered for sale (Pet. App. B6). The bids were opened on April 21, 1988, with Powelson in attendance. The property was sold to the Chicago Title Insurance Company for $400,000. This amount fully paid the taxes owed, plus all costs. The surplus of $93,186.48 was paid to the Estate (*id.* at B5-B6).

After the sale was concluded, the Estate filed an amended complaint which Powelson joined in his individual capacity. The amended complaint sought to vacate the administrative levy and sale (Pet. App. I1-I9). The district court dismissed the complaint. The court concluded that equitable relief was not appropriate because the Estate had an adequate remedy at law in a refund action under 26 U.S.C. 7422 (Pet. App. H1-H6).

2. The Estate thereafter filed an administrative refund claim, which was denied by the IRS (Pet. App. D7). The Estate and Powelson then sought leave to file a new amended complaint. The district court granted this motion only to the extent of allowing the Estate to file a suit for refund. Pursuant to this order, the Estate filed its final amended complaint seeking a refund of the estate taxes. The Estate did

not allege in its final amended complaint that it did not owe the taxes. Instead, the Estate alleged that the Notice of Sale was ineffective because it was served by mail and not in person (*id.* at D1-D11). Powelson sought no individual relief in this final amended complaint.

3. On May 11, 1989, Powelson (who was no longer a party to the First Suit) filed a separate action in his individual capacity as distributee, seeking a declaratory judgment and an order quieting title to the property (the Second Suit). An amended complaint in the Second Suit added the Chicago Title Insurance Company (the purchaser of the property) as an additional plaintiff. The plaintiffs in the Second Suit made the same allegations made by the Estate in the First Suit and also contended that the sale had taken place in the wrong county (Pet. App. N1-N20).

4. On September 21, 1989, the district court granted summary judgment to the government in the Estate's refund action (the First Suit), rejecting all of the Estate's claims on the merits (Pet. App. B2-B15). On October 12, 1989, the district court dismissed for lack of jurisdiction the Second Suit filed by Powelson and Chicago Title, holding (i) that the government had not waived its immunity to suit, (ii) that the suit did not fall within any exception to the Anti-Injunction Act, 26 U.S.C. 7421(a), and (iii) that the suit was barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201 (Pet. App. V3-V6). The court also rejected the quiet title claim because the property had been sold, the government no longer claimed a lien on the property, and therefore the waiver of sovereign immunity in 28 U.S.C.

2410 for quiet title actions involving property in which the government possesses a lien is not applicable in this case (Pet. App. V6-V9).

5. The Estate (but not Powelson in his individual capacity) filed a notice of appeal from the decision in the First Suit. In the Second Suit, both Powelson and Chicago Title appealed. The appeals were consolidated in the court of appeals.

Addressing the Estate's tax refund claim (the First Suit), the court of appeals agreed with petitioners that the IRS had failed to comply with the requirements for personal delivery of the notice of tax sale, as set forth in 26 U.S.C. 6335(a). Relying on *Goodwin* v. *United States*, 935 F.2d 1061, 1065 (9th Cir. 1991), the court held that Powelson's actual receipt of the notice did not satisfy the statute (Pet. App. A3-A5). The court remanded the case for the district court to determine whether this procedural error in the notice of sale would require the government to refund the taxes to the Estate.

With respect to the Second Suit brought by Powelson and Chicago Title, the court of appeals held that declaratory relief was precluded by the express terms of the Declaratory Judgment Act, which excludes from its coverage any dispute "with respect to federal taxes" (28 U.S.C. 2201). The court held that the quiet title action also could not be maintained because the property had been sold *before* petitioners brought their suit, the government no longer claimed a lien on the property and the suit thus did not fall within the limited waiver of sovereign immunity provided by 28 U.S.C. 2410 (Pet. App. A7-A8).

ARGUMENT

1. *The First Suit By The Estate*

a. The only relief sought in the final amended complaint filed in the First Suit was a federal tax refund. The court of appeals agreed with the Estate's contention that the notice of sale of the restaurant was delivered improperly to Powelson under 26 U.S.C. 6335(a).[1] The court did not, however, order a refund. Instead, it remanded for the district court to determine whether a refund was required in these circumstances.[2]

The Estate contends (Pet. 21-22) that the court erred in failing to address *other* alleged procedural irregularities in the sale of the restaurant. Because of the interlocutory nature of the court's decision, however, the Estate is free to renew its contentions in the district court and again on appeal if necessary. Further review of this interlocutory decision is therefore not warranted.

[1] This "improper delivery"—by mail instead of by personal service (see 26 U.S.C. 6335(a))—did not prejudice Powelson. Powelson received actual notice of the sale approximately one month before it occurred (Pet. App. B6, B12-B14). He was in attendance at the opening of the bids (*id.* at B6, B14). Moreover, the sale produced a surplus for the Estate and Powelson of almost $100,000.

[2] As the court of appeals noted (Pet. App. A8), the government contends that petitioners are not entitled to a refund in any event because it is undisputed that there was no overpayment of taxes. See *Lewis* v. *Reynolds*, 284 U.S. 281, 283 (1932). The court could have, and, we believe, should have, affirmed on this basis. Instead, it chose to remand for the district court to consider this issue.

b. Petitioners also contend (Pet. 16-19) that the court of appeals erred in failing to address the Estate's quiet title and declaratory judgment claims. The final amended complaint filed by the Estate, however, contained only a claim for refund. The final amended complaint superseded the prior complaints and made them of no effect. 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1476, at 556-557 (2d ed. 1990). An amended complaint acts as a waiver of any claims made in an earlier pleading that are not incorporated into it. See, *e.g.*, *King* v. *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *London* v. *Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981); *Loux* v. *Rhay*, 375 F.2d 55 (9th Cir. 1967). The court of appeals correctly limited its discussion to the Estate's refund claim, which was the only claim presented in the final amended complaint (Pet. App. D1-D11).[3]

c. Petitioners contend (Pet. 13-16) that the court of appeals erred in not addressing the individual claims of Powelson in the First Suit. But Powelson

[3] Other courts of appeals have held that the filing of an amended complaint does not waive the plaintiff's right to contest on appeal the dismissal of prior claims. See, *e.g.*, *Davis* v. *TXO Production Corp.*, 929 F.2d 1515, 1517 (10th Cir. 1991); *Bloomer Shippers Ass'n* v. *Illinois Central Gulf R.R.*, 655 F.2d 772, 776 (7th Cir. 1981). But petitioners have not raised this issue as a question for this Court's review. Petitioners also did not raise this issue below, despite filing three petitions for rehearing in which they specifically argued that the court erred in failing to address other issues. Moreover, the court of appeals did not specifically address the waiver issue in its opinion. In any event, because of the interlocutory posture of this case, further review at this time is not warranted.

failed to take an appeal in that capacity. As petitioners recognize (Pet. 22), Powelson was acting in these cases in two separate legal capacities—as personal representative of the Estate and as an individual distributee. The caption of the notice of appeal listed as plaintiff "Gordon E. Powelson, Personal Representative of the Estate of Clydena M. Gross, Deceased." The body of the notice stated that "Notice is hereby given that Gordon E. Powelson, Personal Representative of the Estate of Clydena M. Gross, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit" (C.A. App. 1). Since Powelson, acting as an individual, was not listed in the notice of appeal, and since no indication was given in the notice that Powelson was taking an appeal in his indivdual capacity, he was not a party to the appeal. See Fed. R. App. P. 3(c); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) ("The failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal.").

2. *The Second Suit By Powelson And Chicago Title*

a. The decision of the court of appeals affirming the dismissal of the Second Suit brought by Powelson and Chicago Title (for a declaratory judgment and to quiet title) is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

The court of appeals correctly held (Pet. App. A7) that petitioners are precluded from obtaining declaratory relief in this case by the "tax exception" to the Declaratory Judgment Act, 28 U.S.C. 2201. The

Act specifically excepts controversies "with respect to federal taxes" from the general grant of authority to federal courts to award declaratory relief. See *Bob Jones University* v. *Simon*, 416 U.S. 725, 732 n.7 (1974). This exception applies whether the plaintiff challenges the substance of tax assessments or the procedural validity of tax collection activities. See *Hughes* v. *United States*, 953 F.2d 531, 536-537 (9th Cir. 1992); *McCarty* v. *United States*, 929 F.2d 1085, 1088 (5th Cir. 1991).[4]

The court of appeals also correctly held (Pet. App. A7-A8) that 28 U.S.C. 2410 does not waive the government's sovereign immunity from suit in this case. Section 2410 waives sovereign immunity when the plaintiff seeks to "quiet title to * * * real or personal property on which the United States has or claims a mortgage or other lien." *Ibid.* The courts have consistently held that Section 2410 does not apply when the government no longer claims a lien on the property at the time the suit is brought. See *Hughes* v. *United States*, 953 F.2d at 538 (no waiver because the government had sold property prior to commencement of action); *Erickson* v. *United States*, 780 F. Supp. 733, 736-737 (W.D. Wash. 1990) (same). See also *Cummings* v. *United States*, 648 F.2d 289,

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[4] The two district court decisions that petitioners cite (Pet. 14-15) are not to the contrary. *Little River Farms, Inc.* v. *United States*, 328 F. Supp. 476 (N.D. Ga. 1971), does not even discuss the Declaratory Judgment Act. *Rodriguez* v. *United States*, 629 F. Supp. 333, 341-342 (N.D. Ill. 1986), merely holds that the tax exception to the Declaratory Judgment Act does not bar a quiet title suit that is otherwise proper under Section 2410.

292 (5th Cir. 1981) (no waiver because government claimed title interest, not lien interest, in property); *Bertie's Apple Valley Farms* v. *United States*, 476 F.2d 291, 292 (9th Cir. 1973) (same); *Trustees of the Puritan Church* v. *United States*, 294 F.2d 734, 735 (D.C. Cir. 1961) (same). Cf. *Kulawy* v. *United States*, 917 F.2d 729, 733-734 (2d Cir. 1990) (court not divested of jurisdiction by IRS's sale of property after taxpayer filed suit).

Petitioners err in contending (Pet. 20-21) that these consistent rulings conflict with *Aqua Bar & Lounge, Inc.* v. *United States*, 539 F.2d 935 (3d Cir. 1976). In *Aqua Bar & Lounge*, the court noted that the government had previously levied upon and sold the taxpayer's liquor license but the license remained in the taxpayer's name on the records of the Pennsylvania Liquor Control Board at the time of the suit. *Id.* at 937. The court further noted that neither the government nor the purchaser had physical possession of the license, which remained in the hands of the Control Board. On these peculiar facts, the court held that a quiet title suit could proceed under 28 U.S.C. 2410. See 539 F.2d at 937-938. The decision in *Aqua Bar & Lounge* is consistent with the decisions holding that, when a tax sale is not complete at the time suit is commenced, the quiet title action may go forward. See *Goodwin* v. *United States*, 935 F.2d at 1063-1064; *Kulawy* v. *United States*, 917 F.2d at 733-734. In the present case, by contrast, the sale was completed *before* Powelson and Chicago Title filed suit. The decision in this case thus does not conflict with *Aqua Bar & Lounge*.

b. Petitioners argue (Pet. 19-21) that the court of appeals erred in failing to address their claim that there was a "gap" in the chain of title.[5] Because the court held that the government had not waived its sovereign immunity to suit, the court correctly did not reach the merits of this or any of the other of petitioners' claims. See Pet. App. A8 n.3.

[5] Petitioners' contention (Pet. 19-20) is based on the theory that the government purported to sell only the Estate's interest in the Organ Grinder restaurant but that the Estate's interest had previously been transferred to Powelson. That contention is incorrect. The government properly sold the interest that the Estate possessed *at the time the tax lien arose*. See 26 U.S.C. 6339(b)(2) (the deed of sale issued by the Commissioner "shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto"); Treas. Reg. § 301.6339-1(b)(2) (the tax-sale deed conveys the interest that taxpayer had in the property "at the time the lien of the United States attached thereto"). See also *Blacklock* v. *United States*, 208 U.S. 75, 89 (1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

DAVID I. PINCUS
JOEL A. RABINOVITZ
Attorneys

MARCH 1993